United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2021,2035

To be argued by
EDWARD J. KURIANSKY

B pls

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2021, 74-2035

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM DEL TORO and WILLIAM KAUFMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

EDWARD J. KURIANSKY,
JOHN P. FLANNERY, II,
LAWRENCE S. FELD,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

William Del Toro and William Kaufman appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on July 25, 1974, after a two week trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment 73 Cr. 289, filed on April 4, 1973, contained 20 counts. Count One charged the appellants William Del Toro and William Kaufman, and a third defendant, Ralph Ruocco, with conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371. Counts Two and Three, respectively, charged the same

three defendants with offering and giving a bribe to a public official in violation of Title 18, United States Code, Sections 201(b) and 2. In addition, the defendant Del Toro was charged in Counts Four through Ten, the defendant Kaufman in Counts Eleven through Sixteen, and the defendant Ruocco in Counts Seventeen through Twenty, with making false material declarations before the Grand Jury in violation of Title 18, United States Code, Section 1623.

On February 22, 1974, Ralph Ruocco pleaded guilty to Count One of the indictment.

The trial of Del Toro and Kaufman commenced on May 28, 1974 as to Counts One through Ten, Twelve, Thirteen and Sixteen.* On June 11, 1974, verdicts of guilty were returned as to both defendants on all twelve counts submitted to the jury except Count Eight, one of Del Toro's perjury counts.**

On July 25, 1974, Judge Knapp sentenced Del Toro to concurrent terms of imprisonment of one year and one day on each count and Kaufman to concurrent terms of four years on each count. Ruocco, who testified at trial as a Government witness, was also sentenced to imprisonment for a year and a day on the conspiracy count to which he had earlier pleaded guilty.***

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* The court had previously granted, with the Government's consent, defendant Kaufman's motion to dismiss three of the six perjury counts in which Kaufman was named—Counts Eleven, Fourteen and Fifteen—on the ground that he had recanted these false declarations pursuant to the provisions of Title 18, United States Code, Section 1623(d).

** Earlier, at the close of all the evidence, the court had dismissed Count Ten, another of Del Toro's perjury counts, for insufficient evidence (Tr. 1365-1366).

*** Subsequently, on August 1, 1974, Judge Knapp amended Ruocco's sentence by suspending all but two months of the year and a day sentence previously imposed.

At the time of sentencing, Judge Knapp denied defendants' motions for bail pending appeal, finding, pursuant to Rule 46(c), F. R. Cr. P., and Title 18, United States Code, Section 3148, that any such appeal would be frivolous and taken for purposes of delay only. On August 13, 1974, however, this Court granted a stay of execution of sentence to all defendants and they are presently on bail pending the determination of this appeal.

Statement of Facts

A. The Government's Case

1. The Conspiracy Begins

The Government's proof established that the defendants —William Kaufman, a lawyer and real estate broker, William Del Toro, the head of a large East Harlem anti-poverty agency and at the time a candidate for the City Council of the City of New York, and Ralph Ruocco, assistant to the president of a New Jersey Corporation— offered a $15,000 bribe, of which $500 was actually paid, to the Deputy Director of the Harlem-East Harlem Office of the New York City Model Cities Administration to obtain a lucrative lease on a building owned by Ruocco's company for which Kaufman was the rental agent.

In August, 1972, John Sanders, the Acting Director of the Harlem-East Harlem Model Cities Program, asked Pedro Morales, the Assistant Administrator of the office, to investigate possible locations for an East Harlem office of Model Cities (Tr. 49). Sometime during the last two weeks of August, Morales had occasion to meet in his office with William Del Toro, the Executive Director of Massive Economic Neighborhood Development, Inc. (MEND), an East Harlem anti-poverty agency, and mentioned that he was looking for office space on the east side. Del Toro advised Morales that the Ludwig-Baumann Building at

2224 Third Avenue, which had formerly been occupied by MEND, was available for rental. Del Toro indicated that he knew the rental agent for the building, one William Kaufman, and offered to get in touch with Kaufman if Morales wished (Tr. 49-50).

A couple of days thereafter, Del Toro called Morales and informed him that Kaufman was at Del Toro's office. Morales indicated that he would like to meet Kaufman and went directly over to the MEND office at 200 East 116th Street. Once there, Morales and Kaufman were introduced to each other by Del Toro, and the three men discussed the possible rental of the Ludwig-Baumann Building by Model Cities. During this meeting Morales advised Kaufman that if he wanted to rent the building to Model Cities he would have to pay a 10 per cent bribe. Kaufman indicated that he understood "you have to spread it around to get what you want" and said he would think it over and get back in touch with Morales (Tr. 50-54).

Thereafter, also in late August, 1972, Kaufman spoke with Ralph Ruocco, assistant to the president of the Acme-Hamilton Manufacturing Corporation of Trenton, New Jersey, the prime lessee and in effect the owner of the Ludwig-Baumann Building. Ruocco's responsibilities included the supervision and rental of space in the Ludwig-Baumann Building. Kaufman told Ruocco that Model Cities was looking for administrative offices and was possibly interested in renting the remaining available space in the Ludwig-Baumann Building (Tr. 488-491).

2. Morales Is Arrested

On September 1, 1972, before Morales and Kaufman could pursue their negotiations any further, Morales was arrested by the United States Attorney's Office on an unrelated charge of conspiracy to defraud the United States involving the payment and receipt of bribes in

connection with a Model Cities summer camp program. On September 5, 1972, after discussions with his attorney and several Assistant United States Attorneys, Morales admitted that he and his superior, Sanders, had illegally received bribe payments in connection with certain Model Cities camp programs and building rentals, and agreed to cooperate in an undercover investigation being jointly conducted by the United States Attorney's Office and the New York City Department of Investigation into corruption within the Model Cities Administration (Tr. 55-58).

Thereafter, as part of an undercover assignment that spanned some seven months and ultimately resulted in the indictment and conviction of nine individuals,* Morales, maintaining his pose as a corrupt official, engaged from time to time in tape recorded conversations with various persons alleged to have had illicit dealings with Model Cities. Throughout this period, however, and up to the time of his indictment on April 4, 1973, Morales continued to work at the Model Cities office on a full time basis, carrying out his normal responsibilities as Deputy Director, and received his regular salary as a Model Cities employee (Tr. 60-61, 198-199).

3. Kaufman Revives Negotiations

On the morning of September 20, 1972, after several weeks' lapse in the negotiations, Kaufman, hoping to pursue the Ludwig-Baumann deal but unaware of Morales' recent arrest and decision to cooperate with the Govern-

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* Sanders and Morales were indicted separately in a ten count indictment, 73 Cr. 288, filed April 4, 1973, which charged both defendants with three separate conspiracies involving a total of $51,000 paid by various businessmen to obtain camping contracts and building leases with Model Cities. Both Morales and Sanders pleaded guilty to one of the counts in that indictment. On November 30, 1973, the Honorable Charles M. Metzner sentenced Sanders to two years imprisonment, and on September 27, 1974, Judge Metzner sentenced Morales to three years probation.

ment, dropped in unexpectedly on Morales in his Model Cities office at 215 West 125th Street. By coincidence, Morales, who was to have had a recorded conversation with Sanders that very morning, was wearing a concealed transmitter which transmitted the ensuing conversation with Kaufman to a receiver operated by agents nearby (Tr. 61-63).

After some general conversation, Kaufman said he had been doing consultant work for Del Toro at MEND recently but had not as yet rented the Ludwig-Baumann Building (Tr. 67; GX 1, pp. 11-12, 20). Morales then mentioned that Kaufman was to have given him an answer following their original August conversation, and Kaufman replied that he had in fact sent such a message through Del Toro about a week later. Morales said he had not received the message and asked what it was. Kaufman said that Morales had previously asked for 10 per cent and that Kaufman had told Del Toro to tell Morales that he would split $50,000 with him, 50-50, less taxes. Kaufman said he considered the matter "to be delicate", so he sent the message through Del Toro "since he was privy to our original meeting and he had heard everything we were talking." Kaufman said Del Toro had agreed to carry the message to Morales (Tr. 68-70; GX 1, pp. 39-44).

Morales then asked Kaufman why he had come to see him, and Kaufman indicated he would like to revive the Ludwig-Baumann deal. Morales asked Kaufman what he was now offering, and Kaufman responded that he would lease the building to the City and then he and Morales would have a deal between themselves based on a percentage of the long term lease (Tr. 70-73; GX 1, pp. 51-52, 56-60). Kaufman said that he would sit down with Morales and work out the details of the arrangement and that there would be no problem as long as he (Kaufman) came out all right. Kaufman said that Morales was "in

a delicate spot", should put his confidence in him, be patient and he (Morales) would "make a buck." When Morales indicated that Sanders would want to see some money "up front" as a token of good faith, Kaufman replied that they would have to trust each other and that "most of the deals that I make are strictly on a handshake" (Tr. 73-76; GX 1, pp. 65-72). Kaufman then departed, stressing the need to treat their arrangement in a very businesslike way by sending out an inspection team and building up a file of letters and memoranda (Tr. 76-77; GX 1, pp. 79-81, 85-86). Within the next week Kaufman did send two such letters to both Morales and Sanders formally offering the Ludwig-Baumann Building to Model Cities for rental (Tr. 80-83; GXs 2, 3).

On October 26, 1972, Morales, outfitted with a concealed transmitter and tape recorder, visited William Del Toro at the MEND office. Del Toro inquired as to what was happening with Kaufman, and Morales said that Kaufman had been in to see him but had not yet come up with a firm offer. Del Toro expressed surprise that Kaufman had not made a counter-offer as yet, but said Kaufman was a very "workable" guy and offered to get Morales and Kaufman together again to discuss the matter (Tr. 97-98, 100-101; GX 4, pp. 2-6). Del Toro said Kaufman was a "packager" who specialized in putting deals like this together (GX 4, p. 11). Del Toro also indicated that front money would be "no problem" for Kaufman (GX 4, p. 5), although he personally did not require front money from Kaufman because they enjoyed a longstanding relationship of trust (Tr. 101-102; GX 4, p. 13). Del Toro then acknowledged that there had been a payoff between him and Kaufman in connection with MEND's previous lease of the Ludwig-Baumann Building, but when Morales asked Del Toro if he usually worked on a 10% kickback arrangement with Kaufman, Del Toro said it would be unfair to divulge such information and that "everybody has to work their own deal" (Tr. 102-103; GX 4, pp. 25-27). When Morales inquired again as

to what percentage Del Toro normally worked with Kaufman, Del Toro said that he and Kaufman had a "special relationship" and had been "in business for a long time" and that Kaufman "works special rates" with him because of their long affiliation (Tr. 103-104; GX 4, pp. 31-36). Del Toro said that Kaufman would have to "feel easy" with Morales and believe this was "an investment into other things" before the deal could be finalized (Tr. 105; GX 4, p. 36). Del Toro further assured Morales that Kaufman could afford front money but just didn't feel comfortable yet because this was the first time he was "doing something" with Morales (Tr. 105; GX 4, pp. 39-40). The meeting ended with Del Toro emphasizing that it had been he who originally put the deal together for Kaufman and Morales and offering to bring the two men together again to discuss the matter (Tr. 105; GX 4, p. 31). Del Toro advised Morales that everybody would have "to give a little" and that, before the meeting, Del Toro would give Morales "some suggestions" as to how to proceed (Tr. 105; GX 4, pp. 47-51). Del Toro said he would call Kaufman and arrange the meeting for Monday, October 30, 1972 (Tr. 105; GX 4, p. 46).

The following day, Friday, October 27, 1972, Morales received a message from Del Toro to meet him and Kaufman at 5 o'clock on Monday, October 30, 1972 (Tr. 110-111).

4. Kaufman Offers Morales $15,000

On October 30, Morales, again wearing recording equipment, arrived early at Del Toro's office and found Kaufman already there.* Kaufman said he only needed five minutes to state his business and then wanted Morales to digest it. He said that he had just met with the owners

* Del Toro was not present during this conversation because, as Kaufman later told Morales, Del Toro did not want any witnesses to his participation in the scheme (GX 5, p. 10).

of the building, and they had agreed to pay Morales a $15,000 kickback "for giving us the business." The payoff would be "protected," i.e., hidden, according to Kaufman, by building it into Kaufman's commission agreement. He said Acme-Hamilton would issue him a check for an inflated commission and pay the taxes thereon, and when the lease was signed he would give Morales $15,000 "clear off the top" (Tr. 113-115; GX 5, pp. 3-9). Kaufman said Del Toro had told him of Morales' request for a kickback but didn't want to be present at the negotiations (Tr. 115; GX 5, p. 10). When Morales said he was concerned about being double-crossed, Kaufman replied that it was "not a one shot deal" with him and that the City of New York had been his "customer" long before Morales (Tr. 116; GX 5, pp. 14-16). To bolster his credibility, Kaufman told Morales that he had rented a building to the City for two million dollars two years ago under a similarly illicit arrangement (Tr. 116; GX 5, pp. 16-17). Kaufman told Morales to trust him and to do everything in a strictly business-like way, "so that, so everything is letter perfect, aces back to back" (Tr. 119; GX 5, pp. 48-49). In response to Morales' inquiry as to who would pay off Del Toro, Kaufman said that he would "take care of him" but that it was "none of [Morales'] business." Kaufman explained that Del Toro had made him meet separately with Morales so that Del Toro could always say that he never "saw anything or heard anything." Kaufman said he approved of this strategy because when "some people get backed into the wall, they start talking" (Tr. 115, 212; GX 5, pp. 50-52). Kaufman then departed, having agreed to meet Morales the following day, October 31, to inspect the Ludwig-Baumann Building (Tr. 120; GX 5, pp. 61-62).

Shortly after Kaufman left, Del Toro arrived at his office and spoke briefly with Morales. Del Toro asked Morales if everything had gone all right with Kaufman and then said that Kaufman had told him the previous

Friday that he would offer Morales $15,000. Del Toro expressed his approval of the figure ("Fifteen bills is good. You are going to strike it rich."), and said he had "worked hard, working that thing out" for Morales (Tr. 123-124; GX 5, pp. 76-78). Del Toro said he thought it was a "beautiful" deal and that Kaufman had agreed to it because he hoped there would be other similar transactions in the future (Tr. 124-125; GX 5, pp. 81-82). Morales said he was still distrustful of Kaufman, but Del Toro assured him that the deal would go through (Tr. 124; GX 5, pp. 82-84). Morales then suggested that he would rather do business with a fellow Puerto Rican like Del Toro, but Del Toro said that Kaufman had been "in business" many years and, besides, no Puerto Rican could deliver $15,000 (Tr. 125; GX 5, pp. 85-86). The conversation ended with Del Toro saying that he had suggested to Kaufman that he pay Morales half of the money in advance and that Kaufman had said he'd talk to Morales about it (GX 5, pp. 87-88). In any event, Del Toro said, there was no question but that the deal would go through and it was now up to Morales "to deliver" (GX 5, pp. 90-91).

The following day, October 31, Kaufman and Morales inspected the Ludwig-Baumann Building. During this meeting Kaufman confirmed that he had already spoken with the company and that Morales would be paid $15,000 in cash. Kaufman advised Morales to "be sure you can hide the money" and urged Morales "to get the show on the road" (Tr. 128-132).

During this same period, in October and November of 1972, Kaufman was also speaking with Ruocco on a regular basis. Kaufman told Ruocco that if Model Cities rented the building, substantial alterations would be required, but that he would oversee any such constructural work in return for 8% of the cost thereof, above and beyond his regular commission for renting the building. He told

Ruocco, "I intend to make something on this" (Tr. 491-493). At about this time Kaufman also advised Ruocco that he was meeting some resistance at Model Cities and that a payoff might be necessary. Kaufman said, however, that he would include an inflated 6% commission rate in his broker's agreement to cover any such payoffs so that Ruocco would not have to be personally involved. When Ruocco questioned Kaufman as to whether this was the only way to handle the matter, Kaufman replied, "Well, when you deal with the City of New York this is about the only approach" (Tr. 493-494, 546).

On November 9, 1972, Morales and Del Toro met again at the MEND office. Morales said that he still did not trust Kaufman and would need some front money. Del Toro replied that he had already suggested to Kaufman that he pay $2,000 in front and thought that Kaufman had accepted the suggestion (Tr. 135-138; GX 6, pp. 5-11). Del Toro said that he would telephone Kaufman that evening (not from the office, but from home where it was safer) and repeat the suggestion. Del Toro said that he was sure Kaufman and Morales would be able "to take care of business" and that if Kaufman wished, Del Toro would serve as an intermediary for the front money from Kaufman to Morales (Tr. 137-138, 142-143; GX 6, pp. 7-11, 45-47).

On November 13, 1972, Morales met Kaufman in an automobile near the Ludwig-Baumann Building. Kaufman handed Morales a package containing various plans and specifications of the building (GX 7), and they then had a lengthy conversation (Tr. 145-147, 152-153; GX 8, pp. 1-5). Morales said that he needed some front money and asked Kaufman if Del Toro had spoken to him about it. Kaufman responded that at this point he could not come up with front money because he was dealing with a corporation, but that he understood the problem and would get some money as soon as he could expedite it. For the moment, Kaufman said, the important thing was to be sure he had "a deal" and to "protect" himself by com-

mitting the company to a written commission agreement (Tr. 153-154; GX 8, pp. 5-9). Kaufman explained that once he got into the actual negotiation process with the Department of Real Estate, then he could tell the owner he needed "some bread" to spread around (Tr. 154-155; GX 8, pp. 13-15).

At this point in the conversation, Kaufman suddenly became alarmed as to whose car they were in and said he wanted "to make sure there's no wiretaps." Morales assured him that was not the case, and the conversation continued (Tr. 155; GX 8, pp. 16-17). Kaufman suggested that a client of his named Dowdy had been involved in a number of illegitimate transactions, but that he (Kaufman) was protected by virtue of the attorney-client relationship. He said that he had been called "downtown"—i.e., to law enforcement offices—"a half a dozen times already", but that he had never been caught in anything because, as an attorney, he was in the "best position" possible and could "exercise that privilege (of confidentiality) anytime" he wanted (Tr. 156-158; GX 8, pp. 37-42). Later, Morales repeated that he would need some money in front and said that Del Toro had told him Kaufman was agreeable to it. Kaufman acknowledged that Del Toro had spoken to him about it and said that once the owner saw evidence that the deal was in negotiations, Kaufman would be in a position to obtain some front money. In addition, Kaufman stated, Morales would not be the only person being paid off because "there'll be guys in the Department of Real Estate" with their hands out (Tr. 158-159; GX 8, pp. 42-47). Kaufman then told Morales to be patient: "I give you my word of honor, it'll be done, but you got to be psychological, you got to be smart about it" (Tr. 159-160; GX 8, pp. 53, 59-60). Kaufman urged Morales to get the matter before the Department of Real Estate as soon as possible and said that he (Kaufman) was "only waiting for the opportune time" to start spreading bread around so that he wouldn't have any problems (Tr. 160-161; GX 8, pp. 60-62, 65-68).

5. Kaufman Signs the Inflated Commission Agreement

On November 14, 1972, Ruocco, on behalf of Acme-Hamilton, and Kaufman entered into a commission agreement pursuant to which Kaufman would receive 6% of the base rent and 8% of the gross alteration cost in the event Model Cities rented the Ludwig-Baumann Building (Tr. 495-498; GX 9).

On November 28, 1972, Kaufman called Morales at his office and said he had something to show Morales. They arranged to meet for lunch that day at a cafeteria near the Ludwig-Baumann Building. At the meeting Kaufman showed Morales the commission agreement of November 14 between himself and Acme-Hamilton. They then discussed which construction company would do the renovations of the building, and Kaufman said that he could make some additional money by doing business with a particular company which would up the price on certain items of construction. Before leaving, Kaufman urged Morales "to keep moving on the deal" (Tr. 162-165).

Throughout this period and up to the end of the year, Kaufman had several conversations with Ruocco in which Kaufman suggested that a payoff was "probable" and that he would need money "to open some doors for him" at Model Cities (Tr. 498-499).

On January 11 or 12, 1973, Kaufman telephoned Ruocco and said he wanted to see him in New York. When Ruocco asked if the matter could be resolved over the phone, Kaufman said he would rather not because "the lines could be tapped" (Tr. 499). Later that day, Ruocco met with Kaufman at the Ludwig-Baumann Building. Kaufman said that "things were starting to pop with Model Cities" and that he would need $500 "for door openers." Kaufman advised Ruocco to charge the $500 off on the books as out-of-pocket expenses (Tr. 499-500).

6. Ruocco gives Kaufman $500 for Morales

On Monday, January 15, 1973, Ruocco spoke with his superior, Barry Shephard, President of Acme-Hamilton, and told him that Kaufman had asked for $500 "for favors and door openers and to grease a few palms." Shephard okayed the payment and said to "charge it to Kaufman's expenses." Ruocco then mailed out a check to Kaufman for $500 (Tr. 500-592; GX 19).

About a week later, Ruocco called Kaufman and asked what he'd done with the money. Kaufman said he still had the money and was waiting for the "opportunity" to pay it out (Tr. 502-503).

7. Kaufman Pays Morales $500

A few days before January 26, 1973, Morales happened to stop at a neighborhood restaurant to take out some food. While at the counter, he unexpectedly observed Kaufman and Del Toro at a party in the back room. Kaufman approached Morales and said, "Listen, I managed to get you $500." Morales told Kaufman to hold onto the money and to meet him at the restaurant on Friday, January 26, to straighten out the matter (Tr. 166-168).*

On Friday, January 26, 1973, Morales, wearing a recorder, drove to the vicinity of the restaurant. Kaufman got into the car and told Morales to pull around the corner. As he did so, Kaufman handed him a $500 roll of bills, telling Morales, "Here, do something with it. Make a deal, that's the most important thing." As Kaufman exited the car, he exhorted Morales, "Don't sleep on it . . . I'm telling ya, I got a free hand, all right? This is a good chance" (Tr. 168-171; GX 10; GX 11, pp. 1-9).

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* This chance meeting was the first conversation of any substance between Kaufman and Morales since the previous November (Tr. 166).

Shortly thereafter, Kaufman and Ruocco spoke again on the phone, and Kaufman advised Ruocco that he had now paid out the $500. Ruocco asked where the money had gone, but Kaufman replied, "Look, I don't want to mention any names. The less you know about it the less involved you will be" (Tr. 503).

Kaufman and Ruocco had one more telephone conversation before the end of January, 1973. This time, however, Kaufman did inform Ruocco that it was Morales who had received the $500 and that it was a way of "washing each other's hands to show good faith" (Tr. 503).

8. Kaufman Commits Perjury

On Friday, February 2, 1973, Kaufman, himself an attorney, appeared before the Grand Jury and was advised repeatedly of his constitutional rights and the fact that he was a target of the Grand Jury investigation. Kaufman was questioned as to whether he had any knowledge of corruption, in general, within the Model Cities Administration and, in particular, with respect to Morales, Del Toro and Ruocco. Kaufman specifically denied having any such knowledge of corruption, having offered or paid any bribe money to Morales, having been asked for any such money, and having even discussed such payments with either Morales or Del Toro (Tr. 697-737; GX 32, pp. 2-42). Midway through Kaufman's Grand Jury appearance, the Assistant United States Attorney once again reminded Kaufman that he was testifying under oath and subject to prosecution for perjury should he be lying and asked if Kaufman wished to change any of his prior testimony. Kaufman said he did not (Tr. 738-739; GX 32, pp. 43-44). At this point the Assistant placed a dozen boxes containing tape recordings on the table in front of Kaufman, who "looked up at the tape recordings, put his

head down" and said that he wanted to change his testimony (Tr. 739, 832-834; GX 32, p. 44).* Kaufman then proceeded to change his testimony only to the extent of admitting that Morales had in fact asked him for money.** Kaufman, however, continued to deny that he had offered Morales $15,000, that he had paid Morales $500, and that he had discussed the matter with Del Toro (Tr. 739-753; GX 32, pp. 44-57A).***

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* Not only was Kaufman shown the boxed tape recordings in the Grand Jury, but prior to and subsequent to this incident, he was quoted verbatim portions of his taped conversations, which he nevertheless denied having had.

** Kaufman also admitted that in the last 30 years he had been solicited for bribes, which he failed to report, "many times," and that if the Ludwig-Baumann deal had gone through, Morales probably would have been paid (Tr. 739-742; GX 32, pp. 44-47). Kaufman further stated that he "frowned" on paying Morales the bribe not so much because it was a crime but because it "was a steep price to pay" and "the amount didn't sit right with me" (Tr. 745-746; GX 32, p. 50).

*** These denials constitute the false declarations for which Kaufman was convicted in Counts 12, 13 and 16. Counts 11, 14 and 15, based on Kaufman's initial denials of having any knowledge of corruption in Model Cities and of having been asked for or discussed money with Morales, were dismissed prior to trial, with the Government's consent, in view of Kaufman's recantation and admission during his Grand Jury appearance that he had in fact been asked for money by Morales. Although the Government did not press the issue in view of the unquestionable validity of the remaining perjury counts (Tr. 2-3), it is far from clear, in light of the physical demonstration in the Grand Jury of the boxed tape recordings and the verbatim reading to Kaufman of portions of his taped conversations, that Kaufman "recanted" the perjurious declarations contained in the three dismissed counts before it had become "manifest" within the meaning of the statute that his perjury had been or would be exposed. See Point I, *infra*, at 30.

9. Kaufman Cooperates with the Government

Following Kaufman's appearance in the Grand Jury, the Assistant United States Attorney invited Kaufman to come to his office to discuss the matter. The Assistant immediately advised Kaufman again of his constitutional rights and then read the perjury statute, 18, United States Code, Section 1623, to him. The Assistant specifically called Kaufman's attention to the recantation provision of the statute and told him that once an individual's perjury becomes manifest, he can no longer avail himself of a recantation defense. The Assistant then informed Kaufman that the Government had tape recordings of conversations between him and Morales which affirmatively demonstrated that Kaufman had testified falsely in the Grand Jury when he denied, among other things, offering or paying any money to Morales. Kaufman then admitted that he had offered money to Morales but continued to maintain that he had never paid Morales $500. The Assistant told Kaufman that the Government was interested in his cooperation, particularly with regard to the involvement, if any, of officials at Acme-Hamilton. After at first denying that anyone at Acme-Hamilton was involved and having then been advised of the existence of a tape recording to the contrary, Kaufman admitted that Ruocco had in fact authorized a payoff. He said he was willing to tape record a conversation with Ruocco in order to corroborate this allegation, but wanted complete immunity in return for his cooperation. The Assistant, however, advised Kaufman that he would have to plead guilty to a felony and that whatever cooperation he provided would be made known to the sentencing judge. Kaufman finally said he was agreeable to such an arrangement but wanted to talk to an attorney before making a firm commitment (Tr. 834-840A, 874).

On the following Tuesday, February 6, 1973, Kaufman and his attorney, Irwin Klein, met with the Assistant United States Attorney at his office. After Kaufman and Klein

again requested blanket immunity or, failing that, a plea to a gratuity count and were once again rebuffed, Kaufman agreed to plead guilty to either conspiracy to defraud the United States or perjury (the option being his), to resign from the bar and to cooperate with the Government. At subsequent meetings that week, Kaufman revealed that he had in fact paid Morales $500, that his deal with Morales actually began in August of 1972 (before Morales was arrested), and that Ruocco had approved of both the payoff offer and the inflated commission agreement (Tr. 841-846, 874-875).*

Thereafter, on February 13 and 14, 1973, Kaufman, under the Government's supervision, tape recorded two conversations with Ruocco in which Ruocco, in substance, indicated his awareness and approval of the $15,000 bribe to Morales—$500 down and $14,500 on signing the lease, all to come out of Kaufman's commission—and said that he had cleared the matter with his superiors at Acme-Hamilton and that the deal would definitely go through (Tr. 182-184, 191-197, 504-509; GXs 12, 20).**

10. Kaufman Ceases His Cooperation

On Friday, February 16, 1973, Kaufman and Klein again met with the Assistant United States Attorney to discuss Kaufman's cooperation. They said that what Kaufman

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* During this period in early February, 1973, Kaufman also had a chance meeting with Morales at the United States Attorney's office. He told Morales: "Listen, Pete, I have nothing against you; I am cooperating with the fellows now, and with me it is just a matter of survival" (Tr. 181).

** During this period of cooperation, on February 15, 1973, Kaufman also engaged Del Toro in a recorded conversation. When Kaufman told Del Toro that he (Kaufman) had falsely denied to the Grand Jury offering Morales a $15,000 bribe, Del Toro encouraged Kaufman to "carry it (the story) through" (Tr. 1026-1043, 1203-1223; Defendant's Exhibit H).

had done to date for the Government—namely, recording conversations with Ruocco and Del Toro—warranted his being "cut out" of the indictment and that unless he were granted immunity or, at a minimum, allowed to plead guilty to a gratuity count, he would no longer cooperate. The Assistant stated that it had been made clear from the beginning that Kaufman would not be given immunity or a gratuity plea and that he would have to plead guilty to conspiracy to defraud or perjury. The prosecutor further stated that although the Government valued Kaufman's further cooperation, especially in view of his tape recorded revelations of "so-called deals with other public officials", the Government would do without Kaufman's continued cooperation rather than grant him immunity. Klein said he would discuss the matter again with Kaufman over the weekend and call back with a final decision the following Tuesday. Thereafter, Klein did call the Assistant and advised him that Kaufman was terminating his agreement with the Government and would give no further cooperation (Tr. 846-849).

Thereafter, Kaufman appeared in the Grand Jury one more time, on February 23, 1973. Kaufman testified that he had conferred with his attorney, Irwin Klein, and that he (Kaufman) wished to give no further testimony to the Grand Jury (Tr. 755-756; GX 31).*

At about this time, in the latter part of February, 1973, after Kaufman had ceased cooperating, he telephoned Ruocco and asked him to call back on a different phone. When Ruocco asked what "all this cloak and dagger stuff" was about, Kaufman said that "the lines could be tapped." Ruocco then went to another phone and called Kaufman back as requested. Kaufman told Ruocco that they were

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* Previously, while he was cooperating, Kaufman made brief appearances in the Grand Jury on February 9 and 16, 1973, simply for purposes of adjourning his subpoena (Tr. 753-755; GXs 29, 30).

"in trouble", that their February 13 meeting had been "bugged",* and that they should get together immediately to get their "story straight" (Tr. 509-510, 545).

11. Del Toro Commits Perjury

Previously, on February 16, 1973, Del Toro, too, appeared before the Grand Jury, with an attorney in attendance, and was advised of his constitutional rights, that he was a target of the Grand Jury investigation, and that he would be subject to perjury prosecution should he testify falsely. Del Toro denied knowing that money had ever been offered or paid to Morales, denied ever telling Morales that he had suggested to Kaufman that he pay $2000 in front money, testified that he never spoke to Morales about front money other than in the context of *Model Cities* paying *Kaufman* a brokerage fee, denied talking to Morales about his (Del Toro) serving as an intermediary for the payment of money from Kaufman to Morales, and denied ever having a conversation with Kaufman about offering money to Morales** (Tr. 759-804A; GXs 33, 34). Del Toro also testified that he frequently heard from public officials that they had been offered or paid money and that he, himself, was "always" being offered money, but that he never reported any of these incidents to the authorities and no longer remembered the names of the individuals involved (Tr. 766-772, 802-803; GX 34, pp. 5-10, 38-40).

On February 23, 1973, Del Toro appeared again in the Grand Jury and requested, and was given, permission to make a statement to the Grand Jury. After explaining his duties as Executive Director of MEND, and its relation-

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* Kaufman, however, neglected to advise Ruocco that he (Kaufman) had been cooperating with the Government at the time of the February 13 conversation (Tr. 511, 545-546).

** This Grand Jury testimony forms the basis of Counts 4, 5, 6, 7, and 9, the perjury counts on which Del Toro was convicted.

ship to Model Cities, and relating how he had originally come to know Kaufman and Morales, Del Toro reaffirmed the truth of his prior testimony and declined an opportunity to retract or change it in any way (Tr. 805-821; GX 35). He also claimed that, although he had introduced Kaufman and Morales and was present at their original discussion of the Ludwig-Baumann deal in his office, he did not hear portions of their conversation because he was sitting "at the other end of the room" (Tr. 815-817; GX 35, pp. 7-9).

B. The Defense Case

1. William Kaufman

The defendant Kaufman did not testify in his own behalf.

Irwin Klein, Kaufman's former attorney, testified to the events surrounding Kaufman's cooperation with the Government (Tr. 1250-1259). His testimony substantially coincided with the material facts established as part of the Government's direct case.* He said it was his understanding that Kaufman agreed to plead guilty to the conspiracy count, resign from the bar and cooperate with the Government by recording conversations with Ruocco and Del Toro. He acknowledged that he had requested immunity or a gratuity plea on behalf of Kaufman, but that the Government had clearly refused to proceed on that basis. As to the perjury counts, it was Klein's recollection that the Government had initially offered not to charge Kaufman with perjury *in return for* his guilty plea and cooperation, but that he (Klein) had specifically requested that the perjury counts be included in the eventual indictment and

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* Assistant United States Attorney Rudolph W. Giuliani had previously testified to these matters on behalf of the Government (Tr. 826-875).

formally dismissed at a later time so as to bar any future prosecution thereon (Tr. 1253-1259, 1267-1270, 1275-1278, 1285-1286). Eventually, Klein testified, Kaufman reneged on his agreement with the Government when he was asked to record a conversation with the president of Acme-Hamilton, who, Kaufman claimed, was not involved in the bribery scheme (Tr. 1260-1262).

On cross-examination, Klein testified that the Government at no time reneged on its part of the agreement with Kaufman and that it continued to offer him the opportunity to plead guilty to the conspiracy count and to have his cooperation made known to the sentencing judge (Tr. 1272-1273, 1280-1282). Klein also acknowledged that any agreement by the Government either not to indict Kaufman for perjury or to indict him and later dismiss the perjury counts was contingent upon his pleading guilty to conspiracy and cooperating in the investigation, and that once Kaufman decided not to plead guilty, the arrangement was off and there was "no understanding with the government one way or the other about what the indictment would be" (Tr. 1274-1275, 1287-1288).

As to the Government's request that Kaufman record a conversation with the president of Acme-Hamilton, Klein specifically stated that it was *not* his impression that the Government was asking Kaufman to go after an innocent man (Tr. 1272, 1273-1274, 1280, 1282-1283), that he knew the Government was interested in discovering all the individuals at Acme-Hamilton involved in the scheme (Tr. 1270), and that Kaufman had never told him that, in the recorded conversation of February 13, Ruocco had in fact admitted clearing the bribe with his superiors at the company (Tr. 1271-1272, 1274, 1283).* Klein also acknowledged that after Kaufman ceased cooperating he did appear

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* Ruocco testified to the same effect at trial (Tr. 500-502).

in the Grand Jury again, on February 23, 1973, but declined an opportunity to give any further testimony (Tr. 1284-1285).

Kaufman also called three character witnesses, none of whom had heard that Kaufman was censured in 1968 by the Appellate Division of the New York Supreme Court for unprofessional conduct as an attorney (Tr. 1344-1353).

2. William Del Toro

The defendant Del Toro testified in his own behalf (Tr. 931-1233).

Del Toro claimed, in substance, that he had not participated in Kaufman's attempt to bribe Morales and that he only spoke with Morales about the subject so as not to offend him.

Del Toro admitted that he had introduced Kaufman and Morales and that he, Kaufman and Morales had met to discuss the Ludwig-Baumann rental, but stated that the initial meeting occurred not in August, 1972 but during the preceding January or February.* Del Toro also said that following this meeting Kaufman did send him a message, not that he should offer Morales a payoff (as Kaufman indicated in his September 20th recorded conversation with Morales, GX 1), but rather that Morales had asked for money for leasing the building and he (Kaufman) wanted nothing to do with him (Tr. 965-975).**

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* Del Toro maintained that he was out of the country during the last two weeks in August but never produced the documentary evidence he said he could to sustain this claim (Tr. 1151-1155). Moreover, Kaufman's diary reflects several meetings with Del Toro during the latter part of August (Tr. 1151-1155, 1341-1343; GX 29).

** On cross-examination, Del Toro said he "didn't remember" this particular message at the time he testified before the Grand Jury (Tr. 1159-1165).

Del Toro testified that he had to "tolerate" Morales' presence and conversation because MEND needed Model Cities' "sign-off", that is, approval, for certain projects (Tr. 995-996). On cross-examination, however, Del Toro acknowledged that MEND was not dependent on Model Cities for funding, that he only required one or two sign-offs a year from Model Cities, and that Morales had always treated him very cordially (Tr. 1124-1127).

Del Toro explained some of the remarks in his October 26, 1972 conversation with Morales (GX 4) as follows: when he expressed surprise that Kaufman had not yet given Morales a "counter" offer, Del Toro said he was referring to Kaufman offering other "buildings" for rental, and when Del Toro described Kaufman as "workable", he meant that Kaufman specialized in developing projects (Tr. 995-997, 1167-1171). Del Toro claimed that he did not realize Morales was talking about a corrupt transaction during this conversation (Tr. 999) and that he did not himself have any financial dealings with Kaufman (Tr. 1004-1005). Del Toro further explained that when he said on tape that Kaufman worked "special rates" with him, he was referring to the fact that Kaufman received $250 a month as a consultant to MEND (Tr. 1010-1011).

Del Toro also testified that, notwithstanding his statements on the October 30, 1972 tape (GX 5) to the contrary, he never spoke to Kaufman about offering Morales $15,000 prior to that meeting (Tr. 1047-1052) and that when he said he had suggested that Kaufman pay front money and assured Morales the deal would go through, he was only trying to be nice to Morales and to get him out of the office (Tr. 1063-1067).

Similarly, with respect to his November 9th taped conversation with Morales (GX 6), Del Toro said that, despite what he told Morales at that meeting, he had not suggested to Kaufman that he pay $2000 in front money

and, once again, was only trying to "patronize" Morales (Tr. 1075-1076).

As to the perjury counts, Del Toro maintained that the events and conversations he was questioned about in the Grand Jury occurred some three or four months earlier and that, without having the tapes or transcripts available to refresh his recollection, he simply did not recall them, although he intended to give truthful testimony at the time (Tr. 1084-1115).

Del Toro also called three character witnesses to testify to his good reputation for truthfulness (Tr. 1353-1360, 1372-1374).

ARGUMENT

POINT I

There was no impropriety in the conduct of the Grand Jury investigation in this case.

Kaufman claims that the prosecution acted improperly in not disclosing the existence of his tape recorded conversations with Morales prior to questioning him before the Grand Jury; as a corollary to this argument, he claims that the existence of the tapes of the conversations made his perjurious testimony about the conversations not material within the meaning of the perjury statute. He further claims that he recanted his perjurious testimony within the meaning of 18 U.S.C. § 1623(d) and from that appears to claim error in Judge Knapp's submission of his recantation to the jury only on the issue of wilfulness (Brief at 32). These contentions are without merit.

The record at trial establishes that Kaufman appeared before the Grand Jury on February 2, 1973. After he was

asked a few questions which were neither intended nor resulted in incriminating statements by Kaufman, the Assistant United States Attorney interrupted Kaufman, saying he had forgotten "to do something in the beginning that I'm supposed to do", and then proceeded to give Kaufman a complete *Miranda* warning and in addition advised Kaufman that he was a target of the Grand Jury investigation. He also told Kaufman that he was obliged to tell the truth and that he could be charged with perjury if he lied (GX 32, pp. 2-8). The *Miranda* warnings were later repeated again after a recess (GX 32, p. 24). Still later in the examination, after Kaufman had repeatedly lied about his dealings with Morales, the Assistant United States Attorney repeated that Kaufman was subject to a perjury prosecution if he gave false testimony and asked Kaufman whether "in light of that warning", he wished to change his testimony. Kaufman said no. But when confronted with a dozen boxes of tape recordings, Kaufman said he *would* like to change his testimony and then admitted that Morales had asked him for money, though he continued to deny both his offer of $15,000 and his initial payment of $500 to Morales and his conversation with Del Toro (GX 32, pp. 43-57A; Tr. 738-753).* After his appearance before the Grand Jury, Kaufman was advised that the Government had tape recordings of his conversations with Morales which established his perjury before the Grand Jury. Kaufman then admitted he had offered Morales money but continued to deny having paid him $500.

Kaufman's first claim—that the prosecution should have advised him of the existence of the tape recordings before his Grand Jury appearance—is disposed of by *United States* v. *Dowdy*, 479 F.2d 213, 230 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973) and *United States* v. *Winter*, 348 F.2d 204 (2d Cir.), *cert. denied*, 382 U.S. 955 (1965).

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* These denials formed the basis for the perjury counts on which Kaufman was later convicted.

Kaufman seeks to distinguish *Winter* on the ground that it found no duty on the prosecution to disclose testimony by other witnesses, and that the rule should be different when evidence before the Grand Jury consists of tape recordings of the witness' own statements. The distinction is meaningless, and as noted in *United States* v. *Winter, supra*, 348 F.2d at 210, disclosure of evidence before the Grand Jury might well be unlawful. Moreover, we suggest that the assumption implicit in Kaufman's argument—that the Grand Jury's inquiry would have been furthered by telling Kaufman about the tape recordings before he testified—is wholly invalid.* It is a commonplace in litigation—civil or criminal—that a witness with a reason to falsify will often tailor his testimony to meet the facts he believes the opposing party knows. It is only when that witness is mistaken about how he must lie that he can be exposed as a perjurer and forced to tell the truth.** In fact, Kaufman himself pursued such a course in the Grand Jury when

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* Indeed, immediately after Kaufman ceased cooperating, he called Ruocco and said they were in trouble and would have to get their "story straight"—precisely what would have occurred earlier if Kaufman had been prematurely advised of the existence of the tape recordings.

** Similarly without merit is Kaufman's contention that the "invitation to testify before the Grand Jury in this case, [sic] served only to create perjury charges against them and such conduct should not be permitted" (Brief at 19). Here it was known to the prosecutor not just that Kaufman had been involved in paying Morales, but that, by his own tape recorded statements, Kaufman was a repeated "fixer" in governmental programs, a matter plainly of interest to a Grand Jury investigating such corruption. Moreover, as the Court said in *United States* v. *Sweig*, 441 F.2d 114, 121 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971), "It may well develop upon further investigation that others are involved"—which is precisely what happened here with respect to Ruocco. It was perfectly proper to summon Kaufman before the Grand Jury and question him. *United States* v. *Corallo*, 413 F.2d 1306, 1328 (2d Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States* v. *Wolfson*, 405 F.2d 779, 784 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *United States* v. *Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *United States* v. *Potash*, 332 F. Supp. 730, 732-733 (S.D.N.Y. 1971) (Weinfeld, *J.*).

after being shown the boxed tape recordings, he altered his testimony only so far as to admit that which he believed the Government already knew and no more.

Similarly, Kaufman's claim that his false testimony was not material because the truth was established by the tape recordings is without merit. To be material, it is required only that the false testimony would have a "natural effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation." *United States* v. *Marchisio,* 344 F.2d 653, 665 (2d Cir. 1965); *Carroll* v. *United States,* 16 F.2d 951, 953 (2d Cir.), *cert. denied,* 273 U.S. 763 (1927). The *actual* impact of a defendant's statements are irrelevant. *United States* v. *Allen,* 131 F. Supp. 323, 326 (E.D. Mich. 1955); *United States* v. *Masters,* 484 F.2d 1251, 1254 (10th Cir. 1973). Kaufman's precise claim was made and rejected in *United States* v. *Carson,* 464 F.2d 424, 436 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972).

Kaufman's other claim is that the testimony of Assistant United States Attorney Rudolph Giuliani established that he had fully recanted his perjury during the course of his cooperation with the Government for two weeks after his Grand Jury appearance. Assuming *arguendo* that such a recantation occurred, that it occurred during the course of the Grand Jury proceeding, that Kaufman's perjury had not substantially affected the Grand Jury investigation, and that it was not necessary that the recantation occur in the Grand Jury, although Kaufman was given an opportunity to do so when he appeared after his period of cooperation with the Government had ended,* any recantation defense

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* There is substantial authority for the proposition that a recantation of perjured Grand Jury testimony must occur in the Grand Jury. See *United States* v. *Crandall,* 363 F. Supp. 648, 654 (W.D. Pa. 1973), *aff'd,* 493 F.2d 1401 (3d Cir. 1974). The trial court in *Crandall* was reluctant to apply the rule to the defendant there because ". . . the Government did not recall Crandall although very apparently they had the ability and Crandall's consent to do so." 363 F. Supp. at 654. Here, on February 23, 1973, Kaufman appeared before the Grand Jury but declined to give any further testimony.

under 18 U.S.C. § 1623(d) was nevertheless foreclosed to Kaufman by the fact that his recantation occurred only after it had become manifest that the falsity of his testimony had been or would be exposed.

It is plain from the evidence at trial that the falsity of Kaufman's testimony had been or would be exposed at the moment it was uttered. At the time Kaufman denied his conversations with Morales during which he offered the $15,000 bribe, paid Morales $500 and told Morales he had discussed the matter with Del Toro, the Government possessed tape recordings of those conversations which established the contrary. These recordings made it "manifest", certainly in an objective sense, that Kaufman's perjury had been or would be exposed. *United States* v. *Kahn*, 340 F. Supp. 485, 489 (S.D.N.Y. 1971), *aff'd*, 472 F.2d 272, 283 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

Kaufman contends, however, that the availability of the recantation defense turns on whether it is subjectively "manifest" to the witness that the falsity of his testimony had been or would be exposed, that is, that the recantation defense is available to a witness who admits to prior perjury in ignorance of the fact that it has already been or will be exposed. We submit that the rule in *Kahn* establishes that the term "manifest" in Section 1623(d) is to be construed objectively, not subjectively, for in that case both this Court and the trial judge below disposed of Kahn's claim simply by noting that before he recanted, other members of the conspiracy had exposed the bribery scheme in testimony before the Grand Jury.* Neither court was concerned with whether Kahn knew that his

* Nothing in *Kahn* or Section 1623(d) supports the distinction made by Kaufman (Brief at 30-31 fn.) that exposure of the falsity cannot occur except before the Grand Jury. In *Kahn*, the falsity of Kahn's testimony had already become manifest. Here the existence of the tape recordings established that the falsity of Kaufman's testimony "[would] be exposed," if it had not been already.

partners in crime had given the scheme away before he recanted.

Second, even if "manifest" in the statute were meant to refer to the state of mind of a perjurious witness, Kaufman would be entitled to no relief. For by the time he recanted any of the statements for which he was later convicted of perjury, he had already been told by the Assistant United States Attorney that the Government had tape recordings of his conversations with Morales, in which Kaufman had made the statements he had falsely denied before the Grand Jury. Indeed, given the very precise questions about those conversations in the Grand Jury, e.g. (GX 32 at p. 41): "Again let me ask you, did you ever have a meeting during the year 1972, 1973, or anytime, with Mr. Morales in which you said that you had spoken to the owners and that you had made a price with them of $15,000 and Mr. Morales asked you if the $15,000, that he, Mr. Morales was getting from you was 'clean' and you said 'yes.' . . .", and the fact that Kaufman was actually shown the boxed tape recordings in the Grand Jury, it is inconceivable that Kaufman could have been more than blinding himself to the fact that his criminal conduct had been exposed when he denied his criminal conversations with Morales. This, even under a construction of "manifest" turning on the witness' state of mind, it is clear that Kaufman did not recant prior to realizing that his perjury had been or soon would be exposed. *United States* v. *Crandall*, *supra*, 363 F. Supp. at 655; *People* v. *Ezaugi*, 2 N.Y. 2d 439, 161 N.Y.S. 2d 75 (1957).*

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* *Ezaugi* is instructive in this context because the defense there unsuccessfully asserted was based on *People* v. *Gillette*, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dept. 1908), which articulated a recantation defense later codified in part in N.Y. Penal Law § 210.25, which in turn served as the model for Section 1623(d). See H.R. Rep. 91-1549, 2 U.S. Code Cong. and Admin. News, 91st Cong. 2d Sess., at 4024 (1970). In *Ezaugi*,

[Footnote continued on following page]

The final string to Kaufman's bow is *United States* v. *Lardieri,* 497 F.2d 317, 320-321 (3d Cir. 1974) in which the Court of Appeals *sua sponte* raised the question whether ignorance of the recantation provision of Section 1623(d) might require dismissal of a perjury indictment if the witness had been warned of the penalties of perjury but not the recantation defense. While the *Lardieri* court did not hold that under such circumstances an indictment had to be dismissed, its intimation of that result seems at war with both reason and settled doctrine of the Supreme Court and this Circuit.

First of all, the record in *Lardieri,* as here, discloses that in the Grand Jury the prosecutor gave the witness an opportunity to correct this testimony—"I am going to give you a chance to straighten out your testimony. . . . Is there anything that you have said here today that you would like to modify or change?", 497 F.2d at 319"; . . . Is there anything I have asked you, any answer you have given to any of the questions I have asked you that, in light of that warning, you want to change?" (GX 32, pp. 43-44).*

Second, on the facts of both *Lardieri* and this case, the prosecutor's questions made clear that the facts were

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the defendant lied to the Grand Jury about a conversation he had had with an informant, unaware that the district attorney had a tape recording of it. Shortly thereafter, the defendant learned that the truth was known, and he returned before the Grand Jury a few days later and recanted. The Court of Appeals sustained his conviction, holding the recantation defense available only ". . . when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities." 2 N.Y. 2d at 443, 161 N.Y.S. 2d at 78.

* As a result of the warning here, Kaufman, after some resistance, changed some of his testimony, though Lardieri never did. In changing his testimony immediately following this warning, Kaufman implicitly acknowledged an understanding of his right to recant and specifically availed himself of that right—albeit only half-truthfully.

known, and the witnesses' persistent refusal to answer the questions truthfully deprived them of any recantation defense to begin with.

Third, and perhaps most significantly, failure to advise a witness of his rights, whether necessary or not, is no defense to a perjury charge, *United States* v. *Winter, supra,* and whether it is his right to remain silent or to recant perjured testimony can make no difference. And while the result might be different if a prosecutor actively misleads a witness about his rights to the witness' detriment, it is by no means clear that even forcing testimony under such improper circumstances would warrant an excuse for perjury. Cf. *United States* v. *Knox,* 396 U.S. 77 (1969). Moreover, if the need to advise of the recantation defense arises only when a warning is given concerning the penalties of perjury, as *Lardieri* suggests, adoption of the rule *Lardieri* proposes will simply encourage prosecutors not to warn witnesses, to their potential detriment, of the dangers of committing perjury. Indeed, while *Lardieri* is right in pointing out that the recantation defense is intended to promote truthtelling, that Court ignores the fact that the penalties for perjury are also so intended, and, we submit, fails to perceive that it would hinder the pursuit of truth to tell a witness at the outset of his testimony that he may lie with impunity so long as he admits the truth before it becomes "manifest". Finally, we submit that to require that a witness be advised of the existence of a recantation defense will cause far more danger for witnesses than now exists, for the defense is both complex and of limited application, and it seems less likely that a witness will not recant perjury out of ignorance of the defense than that, out of misapprehension of the defense, he will, like Mr. Ezaugi, retract in the mistaken belief that his perjury is thus excused and, by his retraction, give the Government the proof of his perjury that assures his conviction.

Kaufman's other claim, based on *Lardieri,* is that the purposes of the recantation provision ". . . must be read to allow a witness a reasonable time to reflect on the evidence against him . . ." before he should be foreclosed from immunizing his perjury by recanting. But this reading of Section 1623(d) is overbroad.* While, to be sure, the recantation provision was intended to encourage truth-telling, it does not do so to the extent of immunizing perjurers like Kaufman who recant only because their perjury has been or will be discovered. To read the purpose of the statute as broadly as Kaufman suggests *Lardieri* does would be to ignore that the drafters were plainly aware, S. Rep. 91-617, 91st Cong. 2d Sess. 150 (1969), that so single-minded a pursuit of truth would, in the words of the Supreme Court, ". . . encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have the intended effect, but, if discovered, the witness may purge himself of the crime by resuming his role as witness and substituting the truth for his previous falsehood." *United States* v. *Norris,* 300 U.S. 564, 574 (1937).

The net of the matter is that Kaufman had no defense under Section 1623(d). The trial judge's instructions, which authorized the jury to consider the recantation only on the question of wilfulness, were as much as Kaufman was entitled to. *United States* v. *Kahn, supra,* 472 F.2d at 284.

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* Indeed, at trial, even Kaufman's counsel did not move to dismiss perjury Count 13, concerning Kaufman's denials of paying Morales $500, in view of the fact that Kaufman had delayed so long in admitting the falsity of this testimony (Tr. 1326-1327).

POINT II

The Government had no obligation to advise the Grand Jury of Kaufman's cooperation.

Kaufman contends that he was denied due process of law by virtue of the Government's failure to apprise the Grand Jury of his brief period of cooperation with the Government. This contention is frivolous and, indeed, Kaufman can apparently find no case to support it.

Following Kaufman's appearance in the Grand Jury on February 2, 1973, he agreed to plead guilty and cooperate with the Government, which he did for approximately two weeks. During this time Kaufman admitted his involvement in the conspiracy to bribe Morales, acknowledged that he had lied to the Grand Jury, and, after agreeing to plead guilty and cooperate, recorded several conversations with Ruocco and Del Toro. The suggestion that the Government was constitutionally compelled to inform the Grand Jury of such admissions of misconduct and of Kaufman's agreement to plead guilty and cooperate is without foundation in law or common sense.

To sustain an indictment the Government must establish only that there was some competent evidence to support the charges made. *Coppedge* v. *United States,* 311 F.2d 128, 131 (D.C. Cir. 1962), *cert. denied,* 373 U.S. 946 (1963); *United States* v. *Eskow,* 279 F. Supp. 556, 558 (S.D.N.Y. 1968), *aff'd,* 422 F.2d 1060 (2d Cir. 1970); *United States* v. *Reyes,* 280 F. Supp. 267, 269 (S.D.N.Y. 1968); cf. *Costello* v. *United States,* 350 U.S. 359 (1956). Kaufman apparently does not, and cannot, contend that there was insufficient or incompetent evidence before the Grand Jury to warrant the return of a true bill. Rather, he claims that the Government had "an affirmative obligation to present mitigating or exculpatory evidence to the grand jury"

(Kaufman's Brief, pp. 36-37). Such of the evidence to which Kaufman points as was relevant to the Grand Jury's determination of probable cause was powerfully incriminating,* and even if it had possessed some exculpatory value, the Government would not have been obligated to submit it before the Grand Jury. *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936, *reh. denied*, 405 U.S. 1048 (1972); cf. *Lorraine* v. *United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). *United States* v. *Geller*, 154 F. Supp. 727 (S.D.N.Y. 1957), is dispositive of Kaufman's argument. There, Chief Judge Kaufman, then a District Judge, found that the failure to present evidence favorable to the defendant—in that case, as here, an alleged recantation of perjury—did not provide sufficient grounds for dismissal of the indictment, holding, "[I]t is immaterial whether the evidence withheld (i.e., of recantation), if presented, might have persuaded the Grand Jury not to return an indictment." 154 F. Supp. at 731. Moreover, as in *Geller*, "the facts are such that in all likelihood the Grand Jury, even if presented with the recantation, would not have deviated from its original decision to indict." ** *Id.* That such would have been the case is further supported by the verdict below, where the jury, after full disclosure of all the facts and circumstances surrounding Kaufman's recantation and cooperation, found him guilty beyond a reasonable doubt on all remaining counts of the indictment.

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* Even under the advisory standards quoted in Kaufman's Brief (p. 37), the disclosure to the Grand Jury of Kaufman's admissions of bribery and perjury and his agreement to *plead guilty* and cooperate could in no way be held to "negate the guilt of the accused", but rather would tend to confirm it.

** In fact, Eleanora B. Giatti, the Grand Jury secretary, testified, in response to a question on cross-examination by Kaufman's counsel, that the Grand Jury was solely concerned with whether the charges in the indictment were justified and that the fact that Kaufman had cooperated with the Government would not have altered their decision to indict (Tr. 691-692).

POINT III

Morales was a "public official," acting "for or on behalf of" HUD, and was engaged in an "official function" when he was bribed.

Defendants contend that their convictions for bribery should be reversed because Pedro Morales was not a "public official" within the meaning of the federal bribery statute (18 U.S.C. § 201(b)). The contention is wholly without merit.

A "public official", as defined by the statute (18 U.S.C. § 201(a)), is any:

> ". . . person acting *for or on behalf of* the United States, or *any department,* agency or branch of *Government* thereof . . . *in any official function,* under or by authority of any such department, agency or branch of Government . . ." (emphasis supplied).

On the record before this Court, there can be no doubt that Morales was (a) "acting for or on behalf of . . . [a] department . . . of Government", namely HUD, and (b) acting in an "official function" both when he was offered $15,000 and when he was given $500.

A. Morales was a person acting "for or on behalf of" HUD

The Model Cities program in New York City was established under the authority of the "Demonstration Cities and Metropolitan Development Act of 1966", 42 U.S.C. § 3301 *et seq.* Under the Act, HUD has supervisory responsibility for administering the program in New York and in some 74 other cities (Tr. 420). Under its agreement with HUD, New York receives $65 million each year in federal funds. This grant covers 100 per cent of all

project costs and 80 per cent of all administrative costs, including the salary of Deputy Administrator Morales.

To insure that the expenditure of this substantial amount of federal money serves the purposes prescribed by the Act, HUD has required New York to:

> (1) "carry out the Model Cities Program . . . in accordance with the policies, procedures and requirements . . . prescribed by HUD";
>
> (2) Use grant funds "only for those costs which the Government determines to be applicable . . .";
>
> (3) "deposit all grant funds in a depository acceptable to HUD";
>
> (4) Maintain records in compliance with HUD's record keeping requirements concerning all matters covered by the grant agreement;
>
> (5) Document all costs of the program and keep such documentation readily available for HUD;
>
> (6) Submit to regular audit and permit inspection by HUD of all records relating to the program, including contracts, invoices, payrolls, and personnel records; and
>
> (7) Comply with HUD's guidelines concerning, *inter alia*, discrimination in employment, labor standards and conflict of interest * (GX 13).

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* Torres, the HUD representative, further testified that his department made regular visits not only to Model Cities administrative offices, but also to various project sites, and required the City to submit quarterly reports on the progress of individual projects and monthly fiscal statements itemizing the disbursement and flow of federal moneys (Tr. 422, 424, 427-428). Torres testified that if the City proposed to do "different tnings" once the program for the year had been established, the City had to obtain permission from HUD (Tr. 424). HUD's inquiry into such modifications was as detailed as, for example, the reason why rent was being paid for a specific pier (GX 14). As Torres emphasized, "(I)f it (a particular project) involved the use of Model Cities money or the use of the personnel which is paid for with that money, we (HUD) would have had to have been involved" (Tr. 432-433).

Morales, as Deputy Administrator, occupied a high position within the Model Cities Program in New York City (Tr. 439-41). As previously noted, 80% of his $17,500 salary was paid by the federal government (Tr. 336). Every project he approved or recommended was paid for exclusively by federal funds. Finally, his duties were circumscribed and defined by the policies, procedures and requirements prescribed by HUD. Indeed, HUD imposed on Morales conflict of interest provisions which specifically prohibited him from receiving, directly or indirectly, "any share or part of this Agreement or . . . any benefit to arise from the same," and from acquiring "any personal interest in any property, contract, or proposed contract which would conflict with the performance of his duties or responsibilities under this Agreement" (GX 13).*

The defendants argue that the federal bribery statute is inapplicable because Morales was employed by the New York Model Cities Administration. The contention lacks merit. While it is true that he was technically employed by the City of New York, the pervasive control and supervision exercised by HUD over the City's Model Cities Administration, as described above, is such that he is properly regarded as a person "acting for or on behalf of the United States."

It is well settled that the federal bribery statute embraces persons charged with responsibility for carrying out governmental orders even though they may not be employed or paid directly for such services by the Federal government. *United States* v. *Levine*, 129 F.2d 745 (2d Cir. 1942); *Harlow* v. *United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962); *Kemler* v. *United States*, 133 F.2d 235 (1st Cir. 1933); *United States* v. *Van Leuven*, 62 F. 62 (N.D. Iowa 1894).

In *United States* v. *Levine*, *supra*, this Court held that an employee of the Market Administrator for the New York

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* HUD also reserved the right to review, and make recommendations to the City, on the performance of individual Model Cities employees (Tr. 430-431).

Metropolitan Milk Marketing area was a "public official" within the meaning of the federal bribery statute despite the fact that he also was an agent of the State of New York and was paid for his services by funds taxed directly to the milk handlers in the area. Cf. *Gilbert* v. *United States*, 144 F.2d 568, 569-70 (10th Cir. 1944).

Similarly, because of the sweeping language of the statute and the broad protective purpose it was designed to accomplish, the court in *United States* v. *Raff*, 161 F. Supp. 276, 278-79 (M.D. Pa. 1958) had no hesitation in concluding that a partner in a private architectural and engineering firm under contract with the Department of the Army was a "person acting for or on behalf of the United States" within the meaning of the bribery statute. See also *United States* v. *Laurelli*, 187 F. Supp. 30, 32-34 (M.D. Pa. 1960).

The principles articulated in *Levine* and *Raff*, when applied here, indisputably establish that the defendants were properly convicted of bribery of a person "acting for or on behalf of the United States."

Furthermore, it has long been recognized that federal fraud statutes are applicable to local activities funded by the federal government. Thus, for example, in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), the Supreme Court held a statute proscribing the making of false claims for payment against the federal government applicable to certain individuals who had presented false claims to local municipalities funded under the federal Public Works Administration. This Court, in *United States* v. *Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) concluded that 18 U.S.C. § 1001, which forbids the making of false statements "in a matter within the jurisdiction of any department or agency of the United States . . . ," was applicable to false claims for moving expenses under an urban renewal project because, although the claims were presented to

the New York City government, the City received reimbursement from the federal government.*

To conclude that Morales, as Deputy Administrator of the Model Cities program, was a "public official" within the meaning of 18 U.S.C. § 201(a) does not mean, as Kaufman suggests (Brief at 41-42), that the bribery statute must be stretched to "encompass *every* employee of a local government program sponsored in whole or in part by the federal government" (emphasis added). While, to be sure, a menial employee such as a porter is not a "public official", *Krichman* v. *United States,* 256 U.S. 363 (1921), the "responsible nature of [Morales'] position," *Levine, supra,* 129 F.2d at 747, as Deputy Administrator of a multimillion dollar governmental program plainly distinguishes this case from *Krichman,* on which Kaufman so heavily and inappropriately relies. The authority that Morales possessed was unquestionably greater than that exercised by the Indian agency clerk in *Whitney* v. *United States,* 99 F.2d 327 (10th Cir. 1938) or the shoe inspector in *Sears* v. *United States,* 264 F. 257 (1st Cir. 1920)—positions which were held to come within the ambit of the statute.

If the integrity of the federal statutory scheme, under whose authority the Model Cities program exists and operates, is to be adequately safeguarded, the sanctions of the federal bribery statute must be applicable to those responsible officials administering the program so that their official decisions are made solely on the basis of objective evaluation and unbiased judgment. It is of no significance that there is no statutory provision specifically applying the bribery statute to officials of the Model Cities program.

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* The Slum Clearance and Urban Renewal Program Act closely parallels the legislative scheme of the Model Cities Act. 42 U.S.C. § 1450 *et seq.*

In *Levine* this Court held that the employees of the Market Administrator were covered by the federal bribery statute despite the absence of any statutory provision expressly subjecting them to its sanctions. 129 F.2d at 748. Similarly, it is of no consequence that Morales also may be an agent of the City. *Levine* specifically held that even though the Market Administrator in that case also may have been an agent of New York State, "that did not make him or his employees in their federal capacity any less subject to the criminal provisions regulating the conduct of persons acting on behalf of the United States." *Id.* *Levine* further said that a prior state conviction for the same bribery would not have barred the federal bribery prosecution. Certainly the federal government cannot be expected to entrust the preservation of federal funds disbursed under the Model Cities program to the enforcement of local statutes by local law enforcement authorities.

B. Morales was engaged in an "official function" when he was bribed

In August, 1972, John Sanders, the Acting Director of the Harlem-East Harlem Model Cities Program, asked Pedro Morales, the Assistant Administrator of the office, to investigate possible locations for an East Harlem Model Cities' office. Subsequently, Del Toro introduced Morales to Kaufman, the rental agent for the Ludwig-Baumann Building. Morales advised Kaufman that if he wanted to rent the Ludwig-Baumann Building to Model Cities, it would require a 10 per cent bribe. Kaufman said he was aware of that and would get back to Morales.

Subsequently, in September, Morales was arrested by the United States Attorney's office on an unrelated charge. Although Morales thereafter agreed to cooperate with the United States Attorney, he remained at his position at Model Cities throughout. He continued working on a full time basis, carrying out his normal responsibilities and

receiving his regular salary, completely independent, and without the intervention of the United States Attorney's office. Indeed, neither HUD nor the Administrator of the Model Cities program was then aware that Morales was cooperating with the federal authorities (Tr. 274-275, 429).

Kaufman, unaware of the fact that Morales had been arrested, visited Morales in his office to continue the ongoing Ludwig-Baumann deal. Morales told Kaufman he needed some money "up front" as a token of good faith for Sanders, who, at that time was still director. Ultimately, it was agreed that Morales would get $15,000 after the lease was signed. In late January, Kaufman paid Morales a $500 down payment.

Thus, it is clear that Morales was a Model Cities employee engaged in an official function when the bribe was discussed, when it was offered and when it was received. Morales continued in this capacity as Deputy Administrator following his decision to cooperate with the Government. It was indeed to Kaufman's misfortune that he was unaware of this cooperation. Nevertheless, it cannot be said that Morales' altered status, namely from a corrupt to a cooperative public official, affected either his influence or his actual authority to recommend a lease. If, in the period after Morales began cooperating, a legitimate rental agent had approached him with a legitimate proposal, Morales could have responded within the normal course of his duties as Deputy Administrator.*

Both defendants concede that the record establishes that Morales had authority to recommend the site to be leased. They contend, however, that he did not have authority to

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* Indeed, Judge Knapp, in ruling on defense motions at the conclusion of the government's case, commented:

> "... Mr. Morales didn't change his official capacity; his line job was not changed when he went over cooperating with the government. . . . He certainly had the authority to make a recommendation to his superior, and that is all he was being asked to do" (Tr. 882-883).

approve or recommend approval of the lease itself. Kaufman Brief at 44; Del Toro Brief at 4. The distinction is without significance. If, indeed, Morales "only" had authority to recommend the site, such authority, in view of Morales' influence, was tantamount to obtaining the lease. For, if the site recommended was chosen, then the object of the bribe, the lease, necessarily would have resulted. While the facts suggest Morales had influence in excess of that grudgingly conceded by appellants, it is unnecessary, as a matter of law, for Morales to have had more influence. Morales did not need "specific" authority either to approve a lease or to recommend a lease in order to have been acting in an "official function" under the bribery statute. This Court held in *United States* v. *Carson*, 464 F.2d 424, 433 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972):

> "There is no doubt that the federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a Government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision."

See *United States* v. *Heffler*, 402 F.2d 924 (2d Cir. 1968), *cert. denied*, *Cecchini* v. *United States*, 394 U.S. 946 (1969); *Parks* v. *United States*, 355 F.2d 167 (5th Cir. 1965); *United States* v. *Labovitz*, 251 F.2d 393 (2d Cir. 1958); *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955); *Hurley* v. *United States*, 192 F.2d 297, 300 (4th Cir. 1951); *Canella* v. *United States*, 157 F.2d 470, 480-481 (9th Cir. 1946). As this Court stated in *Levine*, *supra*, 129 F.2d at 748, it is unnecessary for an official to have "the power of final decision" and is sufficient if the individual is "within the class charged with making preliminary investigation."

Kaufman's contention that Morales lost his authority as a "public official" when he began his undercover work

is wholly frivolous.* Morales' real influence continued after his arrest. As stated above, he worked full time with the same responsibility and salary. In *Wilson* v. *United States*, *supra*, although Wilson lost authority in a particular chain of supervision as a result of charges against him he was still able to make influential recommendations, and for a bribe, he did so. The Fourth Circuit held it immaterial that he did not have "actual authority." ** In contrast, Morales, though arrested, was not suspended and did not, as a result of the charges against him, lose *any* of his authority; he retained both his influence and his "actual authority."

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* Kaufman also suggests that even if Morales were still considered to be acting for or on behalf of the United States as Deputy Director of Harlem Model Cities after September 1, 1972, he was not acting for or on behalf of the United States with respect to this particular lease transaction. The argument is wholly without merit. In *United States* v. *Rosner*, 485 F.2d 1213, 1228-29 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3679 (June 10, 1974), where the defendant argued that the crime of bribery was "not legally capable of attainment, since the government knew what was going on all the time," this Court stated that "[s]ection 201(b) is violated even though the official offered the bribe is not corrupted, or the object of the bribe could not be attained. . . ." To hold otherwise would lead to an altogether unacceptable result: namely, that whenever a public official like Morales were offered a bribe and thereafter reported it to the authorities and assisted in the ensuing investigation by posing as a corrupt official, the federal bribery statute would be held inapplicable because the official was no longer technically acting for and behalf of his particular agency with respect to the specific transaction in question. Surely the Congress never intended such an effect, which would only reward the briber and discourage the efforts of the honest official.

** In reaching this decision the Court in *Wilson* referred to its earlier decision, *Hurley* v. *United States*, 192 F.2d 297 (4th Cir. 1951), in which it rejected the contrary holding of *Blunden* v. *United States*, 169 F.2d 991 (6th Cir. 1948), cited by both appellants in the instant appeal. 230 F.2d at 525.

C. The Trial Court's charge on the term "public official" was adequate

Kaufman also argues that Judge Knapp did not properly define the term "public official" in his instructions to the jury and that reversible error was therefore committed. Since Kaufman did not except to the charge on this point, and since, in any event, the instructions were adequate, the claim is without substance.

The jury was instructed that it had to determine whether Morales had been acting "for or on behalf of the United States." With respect to this element of the offense, Judge Knapp specifically drew the jury's attention to the testimony of Mr. Torres, the witness from HUD who had described the direct and continuing relationship between HUD and the Model Cities' program (Tr. 1521-22). The jury also was instructed that in order to convict Kaufman, they had to find that the purpose of the promise of $15,000 to Morales was "to influence him . . . *in an official act,** namely, to induce him to make a favorable recommendation that would induce Model Cities to lease the Ludwig-Baumann Building" (emphasis added) and that they had to find that Kaufman had promised Morales $15,000 (Tr. 1521). Read as a whole, the instructions adequately covered each element of the offense. *E.g., United States* v. *Hernandez*, 361 F.2d 446 (2d Cir. 1966); *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958); see also *Cupp* v. *Naughten*, 414 U.S. 141 (1973).

Furthermore, despite the District Court's admonition that any additions to the charge should be presented to the court with particularity (Tr. 1332). Kaufman failed to offer any supplemental charge, nor did he except to the charge as given on this point. He therefore cannot raise the claim on this appeal. Rule 30, Fed. R. Cr. P.

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* See Section 201(a), which defines "official act" as a decision on a matter brought before a public official "in his official capacity".

POINT IV

The assertion of federal criminal jurisdiction under the conspiracy to defraud count was entirely appropriate.

Kaufman argues, in substance, that his conspiracy conviction should be reversed because the Government failed to prove "an interest on the part of HUD in the specific transactions alleged in the indictment" (Kaufman's Brief, p. 47). This claim is not only without merit but, if credited, would effectively defeat the very purpose of the conspiracy statute.*

It is immaterial to a charge of *conspiracy* to defraud the United States whether or not a lease was ever actually consummated or specific federal funds allocated and paid. It has long been held that "it is not essential to charge or

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* Kaufman also mistakenly suggests that if the court had no jurisdiction over the bribery offense, the conspiracy charge must fail as well. However, the conspiracy here charged was not a conspiracy to violate 18, United States Code, § 201, but rather to defraud the United States, to wit, to obstruct HUD's lawful governmental functions by dishonestly influencing the administration and distribution of federal funds by Model Cities. Hence, as Judge Knapp charged the jury (Tr. 1523-1524), the conspiracy count, unlike the two substantive bribery counts, did not require proof of the involvement of a federal "public official", and lack of jurisdiction over the latter offenses would not therefore vitiate jurisdiction over the former. Cf. *United States* v. *Furer*, 47 F. Supp. 402, 405 (S.D.Cal. 1942); *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied, sub nom. Campbell* v. *United States*, 385 U.S. 973 (1966). Accordingly, it would have been error for the court to charge, as Kaufman suggests (Brief, p. 55), that "there could be absolutely no federal interest to be protected if (Morales) were not a public official at the time." The Government's interest in the Model Cities Program was overwhelming, and in no way dependent on Morales' status as a public official. See, e.g., *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 544 (1943). See Point III, *supra*.

prove an actual financial or property loss to make a case under the statute." *Haas* v. *Henkel*, 216 U.S. 462 (1910). More importantly, as the Court stated in *Harney* v. *United States*, 306 F.2d 523, 531 (1st Cir.), *cert. denied*, 371 U.S. 911 (1962), a case relied on heavily by Kaufman:

> "Conspiracy is a crime *even though the contemplated offense may never be consummated.* It is enough to show a scheme whereby through fraud federal funds in normal course would be diverted from their true and lawful object" (Emphasis added).

The only factual distinction of significance between the instant conspiracy and those detailed in *Harney* and *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, *sub nom. Campbell* v. *United States*, 385 U.S. 973 (1966), cited by Kaufman, is that this conspiracy was exposed well before it had accomplished its pernicious purpose. Here, Morales had already been directed by his superior to locate an east side office building for Model Cities, discussions with Kaufman and Del Toro concerning the rental of the Ludwig-Baumann Building had commenced, and an initial bribe solicitation had been made and acted upon even prior to Morales' arrest by the Government. But for the Government's swift intervention, federal funds would necessarily have been fraudulently expended on the rental of the Ludwig-Baumann Building.* To suggest that federal jurisdiction does not here lie because no federal funds were actually committed to or expended on this un-

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* Indeed, precisely such a scheme *was* successful in the related case of *United States* v. *Loschiavo*, 73 Cr. 290, where Model Cities, following Morales' recommendation (which had been induced, prior to his arrest, by a $15,000 bribe from the building owner), entered into a half million dollar lease of a building for a sanitation facility. Loschiavo was convicted of bribery, and his conviction was affirmed by this Court without opinion on March 14, 1974, *United States* v. *Loschiavo*, 493 F.2d 1399 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3212 (October 15, 1974).

worthy project is to ignore the pervasive involvement of the United States Government and HUD in the Model Cities Program, as outlined in Point III, *supra*, and the overriding federal interest in safeguarding the integrity of its funds from fraudulent schemes such as this one, "whereby through fraud federal funds in normal course would be diverted from their true and lawful object." *United States* v. *Harney, supra,* 306 F.2d at 531.*

Under Kaufman's reasoning, the United States would be powerless to protect itself against attempted frauds and could only act once confronted with a criminal *fait accompli*. Here, the the offer and payment of money to a Model Cities official clearly constituted acts in furtherance of a conspiracy to obstruct HUD's lawful governmental functions by dishonestly influencing the administration and distribution of its funds by Model Cities. It is beside the point that the defendants' scheme ultimately failed, that no lease was ever consummated, and that no funds were in fact allocated or distributed.**

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* In addition, unlike *Harney*, where the federal government had to approve specific highway grants to the state on a project-by-project basis, federal participation in the Model Cities Program can in no way be considered "a mere vague possibility", 306 F.2d at 531, for HUD funds each and every Model Cities project 100 percent and any scheme designed to subvert the honest administration of Model Cities would almost by definition defraud the United States in a lawful governmental function. See footnote at p. 37, *supra*.

** It follows, therefore, contrary to Kaufman's contention in Point V of his Brief, that since it is unnecessary for the Government *to prove* a specific allocation or expenditure of federal funds on the lease of the Ludwig-Baumann Building to make out a conspiracy to defraud the United States, it was similarly unnecessary for the court *to charge* the jury to find such a federal interest in the specific project in question.

At various points in the charge, the court repeatedly emphasized the necessity for the jury to find both a federal interest in the Model Cities Program and an attempt to subvert that interest by depriving HUD of Morales' fair and impartial judgment in the administration and distribution of federal funds.

[Footnote continued on following page]

Del Toro also challenges the validity of the conspiracy count, arguing, on the basis of *United States* v. *Zeuli*, 137 F.2d 845, 846 (2d Cir. 1943), that because the substantive crime of bribery "necessarily involves the mutual cooperation of two persons" and was here at least partially committed, a conspiracy count based upon the same illegal conduct was improper. The claim is without merit. As this Court recently stated, "(A)s long as the conspiratorial concert of action and the substantive offense underlying it are not coterminous and fewer participants are required for the commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment." *United States* v. *Becker*, 461 F.2d 230, 234 (2d Cir. 1972), *vacated on other grounds*, 42 U.S.L.W. 3625 (May 28, 1974). Here, three persons were named in the indictment as having engaged in the

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Judge Knapp twice told the jury that the indictment charged the defendants with conspiracy to defraud the United States "by conspiring to deprive it of the honest and impartial services of Pedro Morales, who in his capacity as Deputy Director of Model Cities had the duty of carrying out and implementing certain United States policies and of aiding in the administration of an agency which was financed in large part by United States funds" (Tr. 1514-1515, 1516). The court then made it quite clear that the jury was required to find "that the object of the conspiracy was to some extent to subvert the Model Cities Program, and *hence the objectives of the United States*, by depriving Model Cities, and hence the United States, of Mr. Morales' unprejudiced judgment" (Tr. 1523) (emphasis added).

Although Kaufman had submitted a lengthy and cumbersome request (No. 10) on this point, he never raised a single objection to this aspect of the conspiracy charge after it was delivered to the jury (Tr. 1538), despite the fact that Judge Knapp had expressly cautioned the parties, as follows:

> "At the end of the charge if there is anything you want me to add, you get up and tell me what it is. *I want you to say it particularly*, not that I want you to charge number 16 (for example) because it will be my belief that I have covered it" (Tr. 1332) (emphasis added).

conspiracy, whereas the substantive offense of bribery required the participation of only one of them (in conjunction, of course, with the intended bribee). Moreover, the defendants here were charged with conspiracy to defraud the United States and not with a conspiracy to commit the substantive offense with which they were also charged, to wit, bribery.

POINT V

Del Toro's claim of entrapment is frivolous.

Del Toro argues again here on appeal, as he did unsuccessfully at trial, that he was a victim of governmental entrapment. The claim is untenable both as a matter of law and fact.

At the time this bribery conspiracy began in August, 1972, Morales was the Deputy Director of the Harlem-East Harlem Model Cities Office and as such was seeking office space for an East side branch of Harlem Model Cities. In this connection he had a meeting with Kaufman, arranged by Del Toro, in Del Toro's office and in Del Toro's presence, at which time Morales indicated that a 10 per cent bribe would be required to rent the Ludwig-Baumann Building to Model Cities and Kaufman indicated his approval thereof and suggested they meet again. Shortly thereafter, Kaufman spoke to Del Toro and told him to give Morales a message to the effect that Kaufman would split $50,000 less taxes with Morales in exchange for the lease. All this occurred before September 1, 1972, when Morales was arrested and began to act as a Government undercover agent. Prior to this time then, Kaufman and Del Toro were negotiating a bribe, *not* with a law enforcement agent, but solely with a corrupt public official. An issue of entrapment is raised only ". . . when the criminal design originates with officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its com-

mission *in order that they may prosecute.*" *Sorrells* v. *United States,* 287 U.S. 435, 442 (1932) (emphasis supplied); *Ortiz* v. *United States,* 358 F.2d 107, 108 (9th Cir.), *cert. denied,* 385 U.S. 861 (1966). "(T)he entrapment defense prohibits *law enforcement officers* from instigating a criminal act by persons 'otherwise innocent'" and only comes into play "when *the Government's deception* actually implants the criminal design in the mind of the defendant." *United States* v. *Russell,* 411 U.S. 423, 428, 436 (1973) (emphasis added). This principle is altogether inapplicable as to criminal acts committed prior to, and independent of, any intervention by law enforcement authorities.

Morales' actions following his decision to cooperate with the Government are fully detailed in the tape recorded conversations received in evidence. These conversations, set forth in the Statement of Facts, *supra,* are rife with discussions of corruption and clearly reveal both defendants' predisposition to engage in such activity. Del Toro indicated that he and Kaufman had enjoyed a longstanding corrupt affiliation and that Kaufman worked "special rates" with him. He further acknowledged that he had advised Kaufman to pay Morales $2,000 in front money and that this bribe was being offered in expectation of similar transactions in the future. On these facts it is frivolous to suggest that Del Toro was entrapped as a matter of law. Not only did the tape recordings negate any claim of entrapment by the Government, but they exposed Del Toro and Kaufman as thoroughly corrupt individuals ready, willing and eager to bribe a public official.*

Del Toro's defense of entrapment to the conspiracy and bribery charges was fully presented and argued by counsel

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* Indeed, toward the end of the trial, Judge Knapp commented that he could not conceive of "a clearer case of no entrapment" (Tr. 1321).

and submitted to the jury without exception by the defense either at trial or even now on appeal. The jury obviously resolved this factual issue against Del Toro, and he may not now relitigate this question of fact on appeal.

POINT VI

The Court's rulings at trial were proper.

1. The trial court properly refused to grant Kaufman an accounting with respect to Government vouchers evidencing additional witness fees paid Morales during the course of his protective custody. Morales was cross-examined at length by counsel for both appellants concerning the amount of money he was receiving from the United States Attorney's office, and it was revealed to the jury that he had been receiving $1,000 a month since the time he was originally placed in protective custody and relocated with his family shortly following his indictment in April, 1973. Morales also testified that prior to indictment he had received a $20 witness fee for each of his Grand Jury appearances (Tr. 252-255, 324, 340-341, 398, 628-631, 918a).

Any further testimony on this subject would not only have been cumulative,* but misleading to the jury in that the vouchers Kaufman sought only referred to relatively brief periods over the course of a year and a half when Morales was brought from his place of relocation to New York to prepare for trial and required daily subsistence money for room and board. Under the circumstances, it was clearly within Judge Knapp's discretion to curtail further cross-examination on this point. *E.g. United States* v. *Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); *United States* v. *Blackwood*,

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* Indeed, Del Toro's counsel indicated that he was satisfied with the extent of Morales' previous testimony on the subject (Tr. 324).

456 F.2d 526, 529-530 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).

In any event, the question of Morales' bias and credibility was considerably diluted by virtue of the corroborative tape recordings which detailed every aspect of the conspiracy charged and which, it should be noted, were made *prior to* the time Morales began receiving his monthly allowance.*

2. The trial court properly permitted Morales on direct examination to refer to notes to refresh his recollection as to the substance of several extremely lengthy tape recorded conversations. In relating these conversations, Morales referred to several note cards which he had prepared some two weeks before trial after listening to the tapes and preparing and reading the transcripts thereof. These notes were marked for identification, but not offered, received or read into evidence (Tr. 64-66, 71, 72, 73, 74-75, 98-100). Judge Knapp, although himself finding that the witness was only referring to the notes from time to time and that Morales' memory was truly refreshed thereafter, nevertheless carefully instructed the jury to observe the witness for themselves and to assess to what extent they believed his recollection was refreshed and accurate, or not (Tr. 65, 72, 74-75, 99-100, 188).** Judge Knapp also offered the defendants a full opportunity to review the refreshing material and to cross-examine the witness thereon (Tr. 65, 74, 99, 260-262). Moreover, the court only permitted the witness to refer to the notes when recounting those par-

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* In any event, Judge Knapp instructed the jury to weigh carefully defendants' contention that Morales was anxious to "curry favor with the Government" (Tr. 1502).

** The Court also required the witness to keep the cards in his pocket when not in use so that it would be clear to the jury exactly when he was referring to the notes (Tr. 65-66, 71, 73, 74, 99, 163).

ticular conversations which were fully corroborated by tape recordings later played for the jury (Tr. 147, 163).

It is well established that a witness may use any writing, even if the document itself would be inadmissible, to refresh his memory while testifying on the stand and that the determination that a witness' need to refresh his recollection is justified and that his memory has in fact been revived rests in the sound discretion of the trial judge. *United States* v. *Harris*, 409 F.2d 77, 82 (4th Cir.), *cert. denied*, 396 U.S. 965 (1969); *United States* v. *Baratta*, 397 F.2d 215, 222 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968). As Judge Learned Hand aptly stated in *United States* v. *Rappy*, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947): "Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false." *

3. The Court fairly and properly disposed of Kaufman's unwarranted and untimely application to subject the tape recordings to expert examination. Kaufman's request for testing was made for the very first time *after* the trial had commenced, despite his having listened to and been permitted to make copies of the tapes many months earlier. *Cf. United States* v. *Walker*, Dkt. No. 72-1669 (2d Cir., September 18, 1974). Moreover, although Kaufman initially asked the court to permit further testing of the tapes in order both to improve their audibility and

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* Appellant's reliance on *Putnam* v. *United States*, 162 U.S. 687 (1896) is misplaced. As was succinctly stated by Judge Frank in *Fanelli* v. *United States Gypsum Co.*, 141 F.2d 216, 217 (2d Cir. 1944): "Fortunately, the *Putnam* case, severely criticized by Wigmore, has recently had most of its teeth extracted by *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 [1940]." See also *United States* v. *Riccardi*, 174 F.2d 883, 888 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949) ("Insofar as the condition of contemporaneity is concerned, that decision (*Putnam*) is no longer construed as stating an unyielding rule.").

to inspect them for possible alteration, the latter suggestion was subsequently withdrawn (Tr. 85-90, 277-281, 320-322). As to the audibility question, Judge Knapp offered Kaufman the opportunity to make specific objections to the audibility of the tapes after they were played and to renew his request that the challenged portions be tested. Kaufman's counsel agreed to this procedure and stated that he would provide the court with a "list" of the allegedly objectionable portions at the conclusion of the playing of the tapes (Tr. 322, 648-649). Since no such list was ever submitted, undoubtedly because of the rather high quality and audibility of the tapes played, Kaufman must be deemed to have waived the issue below and not be permitted to resurrect it here on appeal.

4. The trial court properly permitted the Assistant United States Attorney to confer with his own witness, Morales, during a recess in the course of the witness' direct examination. As the Court emphatically stated in *In re United States*, 286 F.2d 556, 562 (1st Cir. 1961), *rev'd on other grounds, sub nom. Fong Foo* v. *United States*, 369 U.S. 141 (1962):

> "We are at a loss to understand the basis for the judge's criticism of the Assistant United States Attorney for talking with a Government witness during a recess. We are not aware of any rule of law, 'elementary' or otherwise, or any canon of professional conduct forbidding the practice. . . . There is nothing wrong that we know of in talking with a witness during intervals in his examination in court."

POINT VII

The admission of Kaufman's Grand Jury testimony did not violate Del Toro's right of confrontation.

The introduction into evidence of both defendants' perjurious Grand Jury testimony did not constitute a violation of the *Bruton* rule as to either defendant, and no such objection was made at trial.

Kaufman understandably makes no such claim at this time in view of the fact that Del Toro testified in his own behalf at trial and was fully available for cross-examination. *Nelson* v. *O'Neil,* 402 U.S. 622, 629-630 (1971); *United States* v. *Zane,* 495 F.2d 683, 694 (2d Cir. 1974). As for Del Toro, Kaufman's Grand Jury testimony (including what Del Toro loosely characterizes (Brief at 6) as Kaufman's "recantation") barely mentioned Del Toro (Tr. 728, 734-735, 744-745; GX 32, pp. 33, 39-40, 49-50) and, to the extent it did, was entirely exculpatory of him and consistent with Del Toro's own Grand Jury and trial testimony. Compare *United States ex rel. Ortiz* v. *Fritz,* 476 F.2d 37 (2d Cir. 1973).* Since Kaufman's Grand Jury testimony did not contain any inculpatory statements as to Del Toro, *Bruton* is not applicable. See, e.g., *United States* v. *Deutsch,* 451 F.2d 98, 116 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972); *United States* v. *Tropiano,* 418 F.2d 1069, 1080-1081 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970). Moreover, Kaufman's Grand Jury testimony, given only days after delivery of the initial $500 down payment on the $15,000 bribe promised and prior to his decision to cooperate with the Government, may be considered as declarations by a co-conspirator in

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* Indeed, Kaufman was convicted on Count 16, a perjury count, precisely for having denied even discussing his bribe offer to Morales with Del Toro.

furtherance of an on-going conspiracy. Judge Knapp found that Kaufman's Grand Jury testimony "was still in furtherance of the conspiracy" and that he did not terminate his participation in the conspiracy until he appeared in the Assistant United States Attorney's office and decided to cooperate with the Government (Tr. 1294-1295). Kaufman's false testimony before the Grand Jury was plainly an attempt to prevent the Government from halting the corrupt scheme before it came to fruition and thus was clearly in furtherance of the conspiracy. See, e.g., *United States* v. *Frank,* 494 F.2d 145, 155-156 (2d Cir. 1974); *United States* v. *DeSapio,* 435 F.2d 272, 283-284 (2d Cir. 1970), *cert. denied,* 402 U.S. 999 (1971).

POINT VIII

The trial court properly charged the jury.

1. Del Toro argues that the court erroneously charged the jury that "an ambiguous answer might constitute perjury" (Del Toro's Brief, p. 9).

Del Toro has badly mischaracterized the language of the trial court's charge on perjury, which reads, in pertinent part, as follows:

> "What you should do is to take each count and ask yourselves two basic questions with respect to them. First, was the overall purpose of the witness to mislead the Grand Jury by the answers given in that count, was that the overall purpose of the witness? If not, if the answer to that is no, that's the end of the matter. If so, are there one or more answers in that count that are both false and were known to the witness to have been false at the time he gave such answers? If you are satisfied beyond a reasonable doubt as to both those propositions you should convict on such count. If you have a reasonable doubt on either, you must acquit.

> Two things I want to emphasize in this regard: *First, all the answers in a particular count need not be false. Some may be ambiguous or even true.* This, the first element, is satisfied if the overall purpose of the testimony set forth in the count was to deceive. However, at least one answer, and you must agree among yourselves as to which one, at least one answer must be actually false. It's no crime, at least not the crime of perjury, to give misleading testimony if each of the individual answers is true. That is another proposition altogether and we are not concerned with it here.
>
> So let me repeat: The overall purpose of the count must be to deceive and at least one answer must be false and you must agree among yourselves which answer that is" (Tr. 1529-1530) (emphasis added).

Del Toro has clearly misread the language emphasized above. Judge Knapp at no time indicated that an ambiguous answer might in itself constitute perjury, but rather that a particular count might include ambiguous, or even true, answers and nevertheless constitute perjury so long as the overall purpose was to deceive and at least one answer contained therein was in fact false.

Thus, the court's charge on perjury was not only proper but, by imposing the dual requirements of general deception and actual falsity on the Government, unduly favorable to the defendant. Moreover, Del Toro failed to object below to the court's instructions* and is therefore foreclosed from raising the issue for the first time here on appeal. Rule 30, F.R. Cr. P.

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* Indeed, co-counsel for Kaufman indicated that he wholeheartedly approved of the court's charge on perjury, as well he might (Tr. 1317-1318).

2. Del Toro further contends that the court inadequately marshalled the evidence with respect to his position. As with the court's charge on perjury, discussed above, Del Toro received more than his due in the court's discussion of the evidence.

A trial judge may summarize and comment upon the evidence within the broad exercise of his discretion. *United States* v. *Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). The *Tourine* Court stated:

> So long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon. *Id.* at 869.

The trial judge displayed an extraordinary sensitivity to the need for him to maintain a completely fair and impartial attitude and to refrain from imposing his view of the facts on the jury (Tr. 1499-1500, 1501, 1537-1538, 1549). He cautioned the jury at length as follows:

> I want you thoroughly to realize what I have been saying from time to time about the respective functions of the Court and jury is not something I give lip service to because some higher authority tells me I have got to say it. It's something I tell you because it's my profound conviction that the proper way to conduct a trial, certainly a criminal trial, is for the jury to concern itself exclusively with the facts and not be in any way influenced by what the Judge may think or what the jury may think he thinks. That is the way I think the trial should be conducted. So if I have done my job right according to my idea of how it ought to be done, you will go into the jury room without any idea of what I think about the credibility or lack of it of any witness or about any fact or issue that is before you.

> Now, if I haven't done my job right in this regard and if I have given you some idea that I have an opinion on something, please don't compound my error by paying the slightest attention to anything you may think that I think (Tr. 1499-1500).

In any event, to the extent that Judge Knapp did summarize the contentions of the parties, he accorded Del Toro's position far more than the "casual mention" Del Toro complains of in his Brief (p. 10). Indeed, in "selecting that evidence which would most likely aid the jury in putting the case in perspective," *United States* v. *Light*, 394 F.2d 908, 911 (2d Cir. 1968), the trial judge chose to discuss "the arguments advanced by and on behalf of Del Toro" to illustrate his instructions on the law of conspiracy (Tr. 1517-1519). In that connection, and contrary to Del Toro's assertion in his Brief (p. 10), the court did *not* assume that the initial meeting between Morales, Del Toro and Kaufman occurred in August, 1972, as advanced by the Government, but expressly informed the jury that "Del Toro places it between December '71 and February '72" (Tr. 1517). Moreover, the trial judge emphasized Del Toro's claim "that all he intended to do was to get Morales off his back and that he never did or intended to do any of the things he told Morales about" (Tr. 1518).* By comparison, the court merely stated that it was the Government's position that Del Toro "knowingly acted as intermediary in the negotiations" between Kaufman and Morales (Tr. 1518).

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* Del Toro's suggestion (Brief, p. 10) that the court entertained doubts as to the sufficiency of the evidence of Del Toro's guilt fails to take account of the court's comments, in ruling on defense motions at the end of the case, to the effect that, having heard Del Toro testify in his own behalf, "whatever effect it may have on the jury, it has satisfied me that he was, in fact, involved in the conspiracy with Mr. Kaufman" (Tr. 1293).

On this record, the trial court's marshalling of the arguments cannot but be deemed proper and well within its discretion.

POINT IX

The District Court properly exercised its discretion in imposing sentence on Kaufman.

Contending that he was a victim of mechanical sentencing, that his sentence was disproportionately long, and that he was penalized for standing trial, Kaufman asks that his sentence be vacated and remanded for resentencing by another judge. Kaufman's claims are patently frivolous and at odds with the record.

Inasmuch as the "aim of the sentencing court is to acquire a thorough acquaintance with the character and history of the man before it," *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), Kaufman's only possible complaint is that the trial judge here gained *too* thorough an acquaintance with his character and history. A judge is guilty of mechanical sentencing only when he displays a "fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant." *United States* v. *Baker*, 487 F.2d 360, 361 (2d Cir. 1973); *United States* v. *Schwarz*, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, *J.*, dissenting). Unlike the sentencing judge in *Woosley* v. *United States*, 478 F.2d 139 (8th Cir. 1973), who flatly declared that he routinely imposed the maximum sentence in all selective service cases, the trial court here at no point even suggested that it was his habit or custom to sentence all bribers or perjurers to any particular term of imprisonment. Indeed, in sentencing the three defendants in this case, all of whom had admitted or been found guilty of identical crimes, to wit, conspiracy, bribery and perjury, Judge Knapp displayed an utterly non-mechanical, individ-

ualized approach to sentencing.* The implication in Kaufman's Brief (p. 61) that the court blindly accepted the Government's recommendation ** of a four year sentence for Kaufman is unwarranted and misleading. Not only did the court expressly decline to follow the Government's additional request of a $10,000 fine for Kaufman (Sentencing Tr. 29), but completely rejected the Government's recommendation of a four year and $10,000 fine sentence for Del Toro.

Judge Knapp painstakingly assessed each defendant's character, background and degree of culpability in the crimes charged. Unfortunately for Kaufman, he was, as he should have been, found wanting by almost every standard of measurement. Here, the court, relying on the trial record, found that Kaufman, whose sole "motive was making money", had been "convicted of an extraordinarily serious crime," was "clearly the man who originated this scheme," was, according to his own taped statements, "in the habit of dealing in this general fashion," and "is the man responsible for the situation in which all of us find ourselves" (Sentencing Tr. 15, 28). As Judge Knapp stated, "[O]ne cannot avoid the impact of the trial insofar as it discloses the personality and the attitudes of the person being tried" (Sentencing Tr. 28). Judge Knapp's reliance on the testimony at trial in arriving at Kaufman's sentence was entirely permissible. *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *United States* v. *Needles*, 472 F.2d 652, 655

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* Kaufman received a four year jail term, Del Toro one year and a day, and Ruocco two months.

** Prior to sentencing Judge Knapp had requested the Government to provide sentencing recommendations as to Kaufman and Del Toro. Although the Government did advise the court of its recommendations in a brief letter—sarcastically referred to by Kaufman as a "one liner" (Brief, p. 61), the Government made a full statement of its reasons at the time of sentencing, emphasizing the uniquely deterable nature of the crimes and individuals involved (Sentencing Tr. 2-6).

(2d Cir. 1973); *United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972). Indeed, "in exercising a frequently enormous range of discretion," *United States* v. *Hendrix*, Dkt. No. 74-1603 (2d Cir. October 15, 1974) at 5807, the sentencing judge may not only "consider matters that would not be admissible at a trial" but may even refer to "evidence introduced with respect to crimes of which the defendant was acquitted." *United States* v. *Sweig, supra.*

In any event, although the "effort to appraise 'character' is, to be sure, a parlous one, . . . it is in our existing scheme of sentencing one due to the rational exercise of discretion." *United States* v. *Hendrix, supra*, at 5809. The facts here presented completely refute the charge that the court employed a fixed and mechanical approach in imposing sentence. To the contrary, they show a careful consideration of the individual before him and of the competing considerations of sentencing.

Kaufman's claim based on the alleged disparity in sentencing amongst the various defendants in the Model Cities investigation is equally unavailing. Kaufman attributes this disparity to "the court's confirmed prejudice against so-called corruptors of public officials" (Brief, p. 64), a prejudice, one might find, not altogether lacking in appeal. However, additional clarification is in order.

In the first place, the other four Model Cities defendants referred to by Kaufman were sentenced by another District Judge, to whom a certain individual latitude must certainly be accorded. Moreover, of the four defendants in question, one (Storms) cooperated with the Government* and pleaded guilty to a single conspiracy count, another (DeWitt) pleaded guilty to a single perjury count, a third

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* Most sentencing judges properly consider "cooperation" with law enforcement officials as "a factor in defendant's favor." *United States* v. *Hendrix, supra*, at 5810; *United States* v. *Sweig, supra*, 454 F.2d at 184.

(Loschiavo) was convicted on a bribery count but acquitted of conspiracy, and the fourth (Sanders) pleaded guilty to conspiracy. None of these individuals was convicted of conspiracy, bribery *and* perjury, as was Kaufman.

More importantly, perhaps, none of these individuals presented as compelling a case, as did Kaufman, for what Judge Knapp referred to as "the vindication of public morality" (Sentencing Tr. 28), that is, deterrence. Even Kaufman's counsel seemed to recognize (Sentencing Tr. 14), as has this Court in the past, "that deterrence may be a proper goal of punishment." *United States* v. *Velazquez*, 482 F.2d 139, 141 (2d Cir. 1973). As in *Sweig*, Judge Knapp was confronted with evidence revealing "a picture of corruption of a very profound kind" and felt it necessary "to deter people who might be disposed to commit such a crime in the future." 454 F.2d at 182-184. Here, as in *Velazquez*, the seriousness of Kaufman's crimes indicated that "probation, suggested by appellant as the appropriate sanction, . . . would have virtually no general deterrent effect." 482 F.2d at 141. Kaufman was a member of the bar. He had previously been censured by the Appellate Division, First Department, in 1968, for unprofessional conduct as an attorney, to wit, issuing over 200 worthless checks on his account or on accounts of corporations he controlled at a time when he was a major landlord in Harlem.* Furthermore, the tape recordings in evidence of Kaufman's own statements revealed that Kaufman viewed the attorney-client privilege as a shield behind which to hide the unlawful conduct of himself and his clients and that he had engaged in a pattern of corruption in his dealings with the Department of Real Estate, the Buildings Department and other New York City agencies for many years. As Judge Knapp found, Kaufman was "at the top of the scale" both in terms

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* On this matter, Judge Knapp was more than fair to Kaufman, stating, "it doesn't enter into my thinking" (Sentencing Tr. 16).

of his individual culpability with respect to the crimes charged and, "considering his station in life," the deterrent value of his punishment (Sentencing Tr. 25). This, then, contrary to Kaufman's assertions, is simply not a case where a district judge "has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon his co-defendants." *United States* v. *Wiley,* 278 F.2d 500, 503 (7th Cir. 1960). Thus, whatever disparity may exist in Kaufman's sentence, it is fully justified on the facts.

Finally, there is absolutely no support in the record for Kaufman's claim that he was penalized for his failure to plead guilty. Judge Knapp expressly disavowed any such intention, stating that "the American Bar Association standards say that no man should be penalized for standing trial. I certainly agree with that" (Sentencing Tr. 27). The Court expressed this opinion in the context of explaining that when a man does choose to stand trial he necessarily reveals more of his character and personality in the course of that trial than might otherwise be the case. That the court should consider such information gathered at trial in imposing sentence is, of course, as was pointed out above, altogether appropriate. Furthermore, although the court did note in passing Kaufman's apparent continuing failure to accept moral responsibility for his actions, the court made it clear that Kaufman was not being penalized for failing now to admit his guilt inasmuch as contrition is irrelevant where "rehabilitation is not involved" (Sentencing Tr. 28).*

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* *Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969), relied on by Kaufman for the proposition that resentencing may be required where a defendant is pressured to admit his guilt after trial, has recently been questioned by this Court. *United States* v. *Hendrix, supra,* at 5808-5810 ("If the notion of 'repentance' is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes.")

Therefore, since Kaufman's sentence was within the statutory limits * and not based in any way on impermissible considerations or materially incorrect information, it is not open to review in this Court. *Dorszynski* v. *United States*, — U.S. —, 42 U.S.L.W. 5156, 5161 (June 26, 1974); *United States* v. *Velazquez*, *supra*, 482 F.2d at 142.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

EDWARD J. KURIANSKY,
JOHN P. FLANNERY, II,
LAWRENCE S. FELD,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

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* The four year sentence imposed on Kaufman was substantially less than the theoretical maximum of 50 years which the court might have imposed by sentencing the defendant consecutively on the three counts of perjury, two counts of bribery, and one count of conspiracy of which he was convicted.

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